Law in a law-governed union (Recht in einer Rechtsunion): The Court of Justice of the European Union and the free law doctrine

Law in a law-governed union
(*Recht in einer Rechtsunion*)

The Court of Justice of the European Union and the free law doctrine

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I declare that the work presented in this thesis is my own.

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Abstract

The Court of Justice of the European Union characterizes the Union as a *Rechtsunion*: a law-governed union. The conception of "the law" in Article 19 paragraph 1 of the Treaty on European Union transcends the Treaties, according to the Vice-President of the Court of Justice, Koen Lenaerts. This thesis demonstrates with reference to the work of Georg Jellinek that the Union is a non-sovereign state and, with reference to the work of Eugen Ehrlich in particular, that the state-based perception of law is a misperception. Not all production of law is reserved to the state and not all law is state-recognized law. There is extra-state law. It has been alleged that the Court of Justice of the European Union has had "a free law attitude". The author discusses the free law doctrine developed at the beginning of the twentieth century and has made literal translations of writings in German, French and Italian by the main representatives of the free law movement. The free law doctrine provides a descriptive framework for the case-law of courts. The author describes the creation by the Court of Justice of four constitutional principles of Union law through its case-law. He concludes that every court is, to quote Hermann Kantorowicz, *praeter legem* law-creatively active and has, in that sense, a free law attitude. The decisions of judges are often volitional decisions. How the law will be applied should be predictable but volitional decisions, because they are unpredictable, are inconsistent with the principle of legal certainty. In the Union and its member states the judiciary and not the statute or "the law" is pre-eminent. The author suggests how the concept of law should be defined in a material *Rechtsunion*. He argues that societal legal norms could be provided with an appropriate position consistent with the principle of legal certainty by making the validity of a societal legal norm contingent on its material lawfulness.

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"*...een unie die wordt beheerst door het recht*"[1]

„*...wir leben in einer Rechtsunion, in der Europäischen Union...*"[2]

Chapter 1

The Union is a law-governed union (*die Union eine Rechtsunion ist*), the Grand Chamber of the Court of Justice of the European Union emphasized (*betonen*) in paragraph 44 of the German language version[3] of its judgement of 29 June 2010 in Case C-550/09 Strafverfahren gegen E und F [2010] ECR I-6213. „*Die Union ist…eine Rechtsunion*[4]", the Grand Chamber of the Court of Justice repeated in the German language version of its judgement of 26 June 2012 in

[1] "…a union that is governed by law". From paragraph 32 of the Dutch language version of the order of 17 December 2009 of the President of the General Court of the European Union in Case T-396/09 R Vereniging Mileudefensie en Stichting Stop Luchtverontreiniging Utrecht tegen Europese Commissie. This order was published in Dutch and French only and Dutch was the procedural language (*langue de procedure*; *Verfahrenssprache*). The expression used in the French language version is « *une union de droit* ».

[2] "…we live in a law-governed union, in the European Union…". Johann Wadephul, CDU member of the German Bundestag, 20 January 2011. See Plenarprotokoll 17/84, Deutscher Bundestag, 20 January 2011, p. 9409.
http://dip21.bundestag.de/dip21/btp/17/17084.pdf

[3] In the English language version (German was the procedural language) this is mistranslated as "…the European Union is based on the rule of law…". Although the literal translation of *Rechtsstaat* is law-state or state of law *Rechtsstaat* means and should be translated "law-governed state" (Heinrich, 2001, p. 5; Mény, 2003, p. 62; Feldbrugge, 1993, p. 56; Hewitson, 2001, p. 728; McAdams, 2001, p. 29; Cohen, 1992, p. 302). For instance, in *Ekonomikas, lietvedības un darba organizācijas termini* (1995), a quadrilingual (Latvian, Russian, English and German) dictionary approved by the Terminology Commission of the Latvian Academy of Sciences, "law-governed state" is the English translation of *Rechtsstaat* (LZA Terminoloģijas komisija, 2013). In paragraph 34 of the English language version of the judgement of 26 April 1995 of the European Court of Human Rights in Prager and Oberschlick v. Austria (Application no. 15974/90) *état de droit* – the French translation of *Rechtsstaat* – is translated "law-governed state". In Gyldendal's Danish-English/English-Danish Dictionary (*Gyldendals Dansk-Engelsk/Engelsk-Dansk Ordbog*) (2009) *retsstat*, the Danish translation of *Rechtsstaat*, is translated "state governed by law".

[4] In the language versions other than English of this judgement of the Grand Chamber *Rechtsunion* is translated съюз, основан на правото (Bulgarian), *Unión de Derecho* (Spanish), *unií práva* (Czech), *retsunion* (Danish), *õigusel rajanev liit* (Estonian), ένωση δικαίου (Greek), *union de droit* (French), *unione di diritto* (Italian), *tiesiska savienība* (Latvian), *teisinė sąjunga* (Lithuanian), *jogi unió* (Hungarian), *unjoni ta' dritt* (Maltese), *unie die wordt beheerst door het recht* (Dutch), *unią prawa* (Polish), *união de direito* (Portuguese), *uniune de drept* (Romanian), *úniou práva* (Slovak), *Unija temelji na vladavini prava* (Slovenian), *oikeusunioni* (Finnish) and *rättslig union* (Swedish). The Dutch translation – union that is governed by law – is the only properly descriptive one.

Case C-336/09 P Republic of Poland v. European Commission [2012] ECR I-0000 in paragraph 36. On 23 April 1986, in Case 294/83 Parti écologiste 'Les Verts' v. European Parliament [1986] ECR 1339, the Court of Justice had underlined (*souligner*) in paragraph 23 that the then European Economic Community was "a law-governed community (*une communauté de droit*[5]; *eine Rechtsgemeinschaft*[6]), in that (*en ce que*) neither its member states nor its institutions[7] can escape (*n'échappent au*) review of the conformity of their acts with the basic constitutional charter, which is the Treaty"[8] (i.e., the then Treaty establishing the European Economic Community). The Union "is a law-governed union (*die Union eine Rechtsunion ist*), in which its organs, institutions and bodies are subject to review of the conformity of their acts (*actes*; *Handlungen*), in particular, with the EU Treaty[9] and FEU Treaty[10]", the Court of Justice noted (*Hinweis*) in paragraph 30 of the German language version its judgement of 14 June 2013 in Case C-533/10 Compagnie internationale pour la vente à distance (CIVAD) SA v. Receveur des douanes de Roubaix and others [2012] ECR-I-0000. The conformity (*Einklang*) of their acts with "general legal principles" may also be reviewed, according to paragraph 36 of the judgement of 26 June 2012.

In the French language versions of its judgements the Court of Justice "seems to have transposed into Community law the concept of *état de droit*[11] by resorting to (*en recourant à*) the notion of *communauté de droit*…", the Secretariat of the Parliamentary Assembly of the Council of Europe observed in 2007 (2007c, p. 13). *État de droit* "is nothing but a literal translation of the word *Rechtsstaat*[12]..." and this "notion" has two "meanings" in French public-law doctrine: the state "operates by means of law" and the state is itself "subjected to law" (Laquièze, 2007, p. 261). Resolution 1594 (2007) of the Parliamentary Assembly of the Council of Europe (2007a, p.1) differentiates between the pre-eminence of law (*prééminence du*

[5] Literally translated, a community of law.

[6] A law-governed community.

[7] In the German language version, "the organs of the Community (*die Gemeinschaftsorgane*)".

[8] French was the procedural language. The French language version is the one quoted.

[9] The Treaty on European Union (OJ C 83, 30.3.2010, p. 13).

[10] The Treaty on the Functioning of the European Union (OJ C 83, 30.3.2010, p. 47).

[11] Literally, state of law.

[12] Literally, law-state or state of law.

droit)[13] and the pre-eminence of the statute (*prééminence de la loi*). It notes that "the expression *prééminence du droit*" is "contained in the Statute of the Council of Europe, in the preamble to the European Convention on Human Rights and in the case-law of the Strasbourg Court". "Every member of the Council of Europe recognizes the principle of the pre-eminence of law (*le principe de la prééminence du droit*) and the principle in virtue of which all persons placed under its jurisdiction enjoy human rights and fundamental freedoms", the French[14] text of Article 3 of the Statute of the Council of Europe declares[15]. The French text of the preamble to the Convention for the Protection of Human Rights and Fundamental Freedoms refers to "European states animated by the same spirit and possessing a common patrimony of ideals and political traditions, of respect for freedom and the pre-eminence of law (*de prééminence du droit*)..." (Council of Europe, 2010, p. 5-6).

In the European Union is law or the statute pre-eminent? Article 19 paragraph 1 of the Treaty on European Union provides that the Court of Justice of the European Union "shall ensure that in the interpretation and application of the Treaties[16] the law is observed (*die Wahrung des Rechts*)" (OJ C 83, 30.3.2010, p. 27; ABl. C 83 vom 30.3.2010, S. 27). This is considered the Court's "overriding task"[17] (Slynn, 1985, p. 4) and the Court of Justice "derives its justification for creating judge-made law"[18] from this "task" (Everling, 2000, p. 35). The "task entrusted to the Court of Justice" of ensuring that " '...the law is observed'...has remained unchanged since

[13] Supremacy of law (верховенство права [verhovenstvo prava]) is not supremacy of statute (верховенство закона [verhovenstvo zakona]) (Parliamentary Assembly of the Council of Europe, 2007a, p. 1). (Supremacy is the English translation of the Russian word верховенство (Adamchik, 1998, p. 967).) The word *Recht* in *Rechtstaat* "should be translated into Russian as права [prava]" (i.e., law), the Parliamentary Assembly advised (2007b, p. 1). The Parliamentary Assembly also "underline[d] (*souligne*) that the concepts *rule of law* and *prééminence du droit*…are synonymous…".

[14] "The official languages of the Council of Europe are English and French": Article 12 of the Statute of the Council of Europe.

[15] « *Tout membre du Conseil de l'Europe reconnaît le principe de la prééminence du droit et le principe en vertu duquel toute personne placée sous sa juridiction doit jouir des droits de l'homme et des libertés fondamentales* ».

[16] The Treaty on European Union and the Treaty on the Functioning of the European Union.

[17] Article 19 of the Treaty on European Union. "The duty of the Court of Justice is to ensure that the law is observed in the interpretation and application of the Treaties" (Schermers, 1974, p. 446). Tridimas (2001, p. 71) described this as the Court's "fundamental function", Moens and Trone (2010, p. 341) its "general task" and Schermers and Waelbroeck (2001, p. 309) its "key function".

[18] In the German language, *Richterrecht*. The Court of Justice has "from the beginning…claimed to be entitled to create judge-made law" (Everling, 2000, p. 32).

1952"[19], Vassilios Skouris, the President of the Court of Justice of the European Union, wrote in 2009 (Court of Justice of the European Communities, 2009, p. 3). The phrase "the law (*des Rechts*)" is not defined in Article 19 of the Treaty on European Union, however – and was not defined in any of the treaty provisions it has "replaced". What is "the law" in this *Rechtsunion*?

Article 19 paragraph 1 of the Treaty on European Union has been compared to Article 20 paragraph 3 of the German *Grundgesetz*[20] (Everling, 2005, p. 713), which prescribes that the judiciary in Germany is "bound by statute and law (*Gesetz und Recht*)"[21]. "The law is not identical with the totality of written statutes (*Das Recht ist nicht mit der Gesamtheit der geschriebenen Gesetze identisch*)", the German Constitutional Court affirmed in its decision of 14 February 1973 in BVerfGE 34, 269, 287, with reference to Article 20 paragraph 3 of the *Grundgesetz*. The "formulation" in Article 20 paragraph 3 of the *Grundgesetz* that the judiciary is bound to " 'statute and law'…varied…[t]he traditional binding of the judge to the statute", the Court said (BVerfGE 34, 269, 286): "Thus, according to general opinion, a narrow statutory positivism (*ein enger Gesetzespositivismus*) was rejected. The formula holds the awareness that statute and law do in fact generally, but not necessarily and always, coincide".

Siegmund Schloßmann (18.11.1844 – 2.7.1909) had written in 1903 (Schloßmann 1903, p. 27; Ehrlich, 1917b, p. 1):

> "The statute is in reality, as paradoxical and disrespectful as it may sound, nothing other than one among certain particular modalities in the constitution, a combination of paper and printer's ink produced by virtue of certain constitutional processes, from which we can infer a certain thought-content (*Gedankeninhalt*), which in turn because of the continuous activity of various people united in the state – rulers and ruled – affected by these effectively psychological and mechanical forces and motivations evokes from them certain modes of conduct (*Verhaltungsweisen*)".

[19] "Our Court first saw the light of day as the Court of Justice of the Coal and Steel Community", Gil Carlos Rodríguez Iglesias, the then President of the Court of Justice of the European Communities, reminded his audience in a speech on 4 December 2002 (Court of Justice of the European Communities, 2003, p. 40).

[20] The constitution of the Federal Republic of Germany. Basic statute is the literal translation of the compound word *Grundgesetz* but the accepted translation is Basic Law. (*Verfassung* is the German word for constitution.)

[21] "The legislature is bound by the constitutional order, the executive power and the judiciary by statute and law (*Die Gesetzgebung ist an die verfassungsmäßige Ordnung, die vollziehende Gewalt und die Rechtsprechung sind an Gesetz und Recht gebunden*)".

Schloßmann's observation was mentioned by Eugen Ehrlich (14.9.1862 – 2.5.1922) in an article published in 1917 on the law-finding of judges on the basis of legal propositions (*Die richterliche Rechtsfindung auf Grund des Rechtssatzes*). "The application of the statute by the judge", Ehrlich wrote in that article, "could appear as a simple thing, in need of no particular elucidation, only so long as one accepted (*annahm*) that the judge simply does what the legislature has instructed him to do". Does the judge "simply" do what he or she has been instructed to do by the legislature?

"Many wrongly believe at present that all law is created (*geschaffen*) by the state through its statutes (*Gesetze*)", Ehrlich (1922a, p. 9) maintained. It is "neither conceptionally essential that law emanate from the state, nor even that it furnish the basis for the decisions of courts or other authorities, or for the ensuing legal compulsion", he wrote in *Grundlegung der Soziologie des Rechts*[22] (1913) in discussing the "concept of law (*Begriff des Rechts*)" (Ehrlich, 1913, p. 17). "In reality, state-made law is only one of the many forms of law obtaining in a state…", Hermann Kantorowicz (18.11.1877 – 12.2.1940) reiterated in his last published work (1958, p. 86). In the European Union "the law" to which Article 19 of the Treaty on European Union refers is not "identical with" the Treaty on European Union, the Treaty on the Functioning of the European Union and the binding legal acts (*bindende Rechtsakte*) of the Union or even these and general legal principles (*allgemeinen Rechtsgrundsätzen*). The law is not "a creation of the state", Kantorowicz wrote in an article published in 1932; the state, he argued, "presupposes the law"[23] (Kantorowicz, 1932, p. 5-6). Ehrlich (1917c, p. 206) denied that the state is "the source of all law in society". The "thought" that it is rests, he said, on "the deep-rooted and with jurists also very widespread vulgar state-based perception of law (*vulgäre staatliche Rechtsauffassung*)":

> "…it is in essence that everything existing of legal order is created through state legislation and is held together through state compulsion[24]. An enormous overestimation of state authority (*eine ungeheure Ueberschätzung der Staatsgewalt*), especially in legislation, underlies it. In reality it is only a tiny snippet (*ein winziger Auschnitt*) of the legal life of society which the state seizes (*erfaßt*) with its legislation...".

[22] Foundations of the sociology of law.

[23] "…this idea is borne out by the history of jurisprudence, which shows that no concept of the state has ever been formed that did not imply some legal elements. It is also borne out by sociology: there never was a phase in human life which was pre-legal…".

[24] „*...alles, was an rechtlicher Ordnung vorhanden ist, durch die staatliche Gesetzgebung geschaffen und durch staatlichen Zwang zusammengehalten wird*".

Ehrlich (1913, p. 127; 1936, p. 159) believed that "only a small part of the law, the state law, really emanates from the state"[25]. State law (*staatliche Recht*) is "a law that has only come into being through the state and could not exist without the state (*es ist ein Recht, das nur durch den Staat entstanden ist und ohne Staat nicht bestehen könnte*)" (Ehrlich, 1913, p. 110). "The great mass of law (*Rechts*) arises (*entsteht*) immediately in society as the inner order of social relations, marriage, family, corporations, possession, contracts, inheritance and has never been scaffolded (*gerusst*) in legal propositions" (Ehrlich, 1922a, p. 9).

There are two legal orders (*Rechtsordnungen*) in a society[26], Ehrlich wrote in *Grundlegung der Soziologie des Rechts* (1913, p. 159; 1936, p. 197):

1. "…the legal order that the society independently creates in the facts of the law (*den Tatsachen des Rechts*), in the existing practices (*Übungen*), dominions (*Herrschaften*), possessions (*Besitzen*), by-laws (*Satzungen*), contracts (*Verträgen*), testamentary arrangements (*letztwilligen Anordnungen*)"; and,

2. "…a legal order that is formed by legal propositions (*Rechtssätze*) and which is implemented (*durchgeführt*) only by (*durch*) the activities of the courts and state authorities".

Ehrlich (1913, p. 159) asserted that "only the norms that these two orders contain actually make up the entire law in the society (*das gesamte Recht in der Gesellschaft*)". The law is the sum of the norms contained in the legal order "that society independently creates in the facts of the law" – the existing practices, dominions, possessions, by-laws[27], contracts and testamentary arrangements – and the norms contained in the legal order "that is formed by legal propositions".

[25] „*...nur ein kleiner Teil des Rechts, das staatliche Recht, wirklich vom Staate ausgeht*".

[26] Society consists of "all the associations in a certain area (*alle Verbände in einem gewissen Gebiete*)" (Ehrlich, 1913, p. 159; 1936, p. 197).

[27] A by-law is in this sense, to use the definition in the *Oxford English Dictionary*, a " 'law' or ordinance dealing with matters of…internal regulation, made…by the members of…[an] association": http://www.oed.com/view/Entry/25566

A legal proposition (*Rechtssatz*) is the "generally-binding version of a legal prescription (*Rechtsvorschrift*) in a statute or a law book"[28] (Ehrlich, 1913, p. 29) and the existence of gaps in legal propositions (*Rechtssätze*) is discussed in chapter 3. The European Union has a legal order "formed by legal propositions". In paragraph 21 of his opinion of 16 January 2008 in Case C-402/05 P Kadi v. Council of the European Union and Commission of the European Communities [2008] ECR I-6363 Advocate General Miguel Poiares Maduro cited "the landmark ruling" in Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR 1 in which, he said, the Court of Justice "affirmed the autonomy of the…legal order" of what is now the European Union. This "legal order" was "accorded an independent normative authority", Maduro (2005, p. 336) wrote in an earlier academic article. As the Court of Justice noted (*rileva*) in the Italian language version[29] of its judgement of 15 July 1964 in Case 6/64 Costa/ENEL, Raccolta 1964, pag. 1135, "unlike ordinary international treaties, the EEC Treaty[30]…established its own legal order, integrated (*integrato*) into the legal orders of the member states...". "The Court has to determine, to ascertain, the law (*das Recht*) whenever it applies it to a specific case", Hans Kutscher (14.12.1911 – 24.8.1993), a Judge of the Court of Justice of the European Communities[31], reported in September 1976 at the Judicial and Academic Conference in Luxembourg organized by the Court of Justice (Kutscher, 1976a, p. I-5; 1976b, p. I-7). "This law does not only consist of written texts (*geschriebenen Texten*)", he said. "The interpretation of law is thus closely and indissolubly linked with the inquiry into the sources of law". Kutscher regarded this as "interpretation in the wider sense (*Auslegung im weiteren Sinn*)". He contrasted it with " 'interpretation' in a narrow sense (*‚Auslegung' in einem engen Sinn*)", the object (*Gegenstand*) of which is "words, phrases, sentences or paragraphs of written texts…"; it is, he said, "almost self-evident" that the interpretation of the law is not limited to this" (Kutscher, 1976a, p. I-7; 1976b, p. I-7). "It is recognized", Kutscher (1976b, p. I-49) stated, "that the judge, by establishing the law, by its concretization or precization, by filling of gaps and by further development of law (*Rechtsfortbildung*), is involved in the process of legal development (*Rechtsbildung*), that therefore one cannot speak of a monopoly of the legislative organs for the production of law (*Rechtserzeugung*), the judiciary and the legislature instead share this task. This also applies to the Community judge and the law-positing organs

[28] „*Der Rechtssatz ist die zufällige allgemeinverbindliche Fassung einer Rechtsvorschrift in einem Gesetze oder einem Rechtsbuch*".

[29] Italian was the procedural language.

[30] The Treaty establishing the European Economic Community.

[31] Kutscher was a Judge of the Court of Justice from 26 October 1970 to 30 October 1980. From 7 October 1976 to 30 October 1980 he was President of the Court of Justice. He had been a Judge of the German Federal Constitutional Court (*Bundesverfassungsgericht*) from 1955 to 1970.

(*rechtsetzenden Organe*) of the Community" (Kutscher, 1976b, p. I-49). Chapter 4 illustrates the production of law of the Court of Justice.

The written law (*das geschriebene Recht*), according to the jurist Fritz Stier-Somlo (21.5.1873 – 10.3.1932), consists of (a) state statutes (*das staatliche Gesetz*), (b) regulations (*Verordnungen*[32]), (c) constitutional statutes (*Verfassungsgesetz*), (d) the autonomous by-laws (*autonomischen Satzungen*) of self-governing bodies[33] and (e) international treaties and state treaties[34] (*die völkerrechtlichen Verträge und die Staatsverträge*) (Stier-Somlo, 1906, p. 107-116). Following the entry into force of the Treaty of Lisbon on 1 December 2009 "the written law (*das geschriebene Recht*)" (Kutscher, 1976a, p. I-14 – I-30; 1976b, p. I-15 – I-31) of the Union comprises the Treaty on European Union, the Treaty on the Functioning of the European Union, the Charter of Fundamental Rights of the European Union[35] and the binding legal acts (*verbindliche Rechtsakte*) of the Union. Under Article 288 of the Treaty on the Functioning of the European Union, regulations (*Verordnungen*), directives (*Richtlinien*) and decisions (*Beschlüsse*) constitute the binding legal acts of the Union (OJ C 83, 30.3.2010, p. 171-172; ABl. C 83 vom 30.3.2010, S. 171-172). What other law is there in the Union and its member states than the written law?

In Germany, as the German *Bundesarbeitsgericht*[36] stated in its judgement of 24 November 1987 in 8 AZR 524/82, the *Bundesverfassungsgericht*[37] "has always recognized the authority of the courts to [further] develop the law (*Rechtsfortbildung*)"[38] (Aaron et al., 1990, p. 105):

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[32] In Union law *Verordnung* is translated as regulation (ABl. C 83 vom 30.3.2010, S. 172); in German law it can also mean ordinance or decree.

[33] Stier-Somlo (1906, p. 114), in the context of the Kingdom of Prussia in 1906, referred to "municipalities, districts and provinces (*Kommunen, Kreise und Provinzen*)".

[34] He defined state treaties as "agreements between the state authority on the one side and the authorities subordinate to it on the other about public-law relations" (Stier-Somlo, 1906, p. 115). "It has been rightly disputed that we are dealing here with treaties, as only one-sided acts of the state authority by virtue of sovereign state will, which limits itself, are possible. The so-called state treaties are therefore…only supreme acts of the state (*staatliche Hoheitsakte*)…".

[35] Article 6 paragraph 1 of the Treaty on European Union provides that the Charter of Fundamental Rights of the European Union has "the same legal value (*rechtlich gleichrangig*)" as the Treaty on European Union and the Treaty on the Functioning of the European Union (OJ C 83, 30.3.2010, p. 19; ABl. C 83 vom 30.3.2010, S. 19).

[36] Federal Labour Court.

[37] Federal Constitutional Court.

[38] The Federal Labour Court cited BVerfGE 34, 269, 287, BVerfGE 49, 304, 318, BVerfGE 65, 182, 190, BVerfGE 69, 188, 203, BVerfGE 71, 354, 362 and BVerfGE 74, 129, 152.

> "The courts, subject to Article 20 paragraph 3 of the [*Grundgesetz*], have the right and the obligation to clarify and transform into decisions value-concepts (*Wertvorstellungen*) inherent in the constitutional legal order (*der verfassungsmäßigen Rechtsordnung*) but not expressed or only incompletely expressed, in the texts of the written statutes (*in den Texten der geschriebenen Gesetze*), by an act of evaluative recognition (*bewertenden Erkennens*) not lacking in elements of will. The judge must avoid arbitrariness; his decision must rest on rational argument. It must be made evident that the written statute (*das geschriebene Gesetz*) does not fulfill its function of justly solving a particular legal problem. The judicial decision then closes the gap by reference to practical reason (*praktischen Vernunft*) and the well-founded general notions of justice (*den fundierten allgemeinen Gerechtigkeitsvorstellungen*) of the community (BVerfGE 9, 338, 340; BVerfGE 34, 269, 287)".

Although notingin paragraph 63 of its decision of 6 July 2010 in 2 BvR 2661/06[39] that the "creat[ion]" of "fundamental rights protection" in the Union "comparable" to the German *Grundgesetz* had been "possible only by means of further developing the law (*rechtsfortbildend*)…" the German *Bundesverfassungsgericht* expressed in the following paragraph a decided – and affected – view of the "limits" of the "further development of law (*Rechtsfortbildung*)" by judges. It is "not law-positing (*Rechtsetzung*) with political creative freedom (*politischen Gestaltungsfreiräumen*)", the *Bundesverfassungsgericht* declared in paragraph 64:

> "Further development of law…follows the instructions set out in statutes or international law. This is where it finds its foundations and its limits. There is particular reason for further development of law by judges where programmes are fleshed out, gaps are closed, evaluative contradictions (*Wertungswidersprüche*) are resolved or account is taken of the special circumstances of the individual case".

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http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2010/07/rs20100706_2bvr266106.html
http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2010/07/rs20100706_2bvr266106en.html

Further development of law exceeds these limits (*überschreitet diese Grenzen*) when it alters (*abändert*) clearly recognizable (treaty-)statutory decisions "which may even be explicitly documented in the wording" or when it creates new rules (*Regelungen*) "without sufficient connection" to statutory statements (*Aussagen*)[40], the *Bundesverfassungsgericht* said. "This is especially inadmissible (*unzulässig*)", it added, "where case-law makes fundamental political decisions (*politische Grundentscheidungen*) above the individual case or through the further development of law (*Rechtsfortbildung*) structural shifts take place in the system of constitutional power- and influence distribution (*strukturelle Verschiebungen im System konstitutioneller Macht- und Einflussverteilung*)".

Union law has been portrayed by Carl Baudenbacher (2009, p. 358), the President of the Court of Justice of the European Free Trade Association, as a "giant gothic cathedral with the three naves": direct effect, precedence (*Vorrang*) and state liability. A fourth nave, overlooked by Baudenbacher, is the protection of fundamental rights (*Grundrechtsschutz*). These are constitutional principles (*Verfassungsprinzipien*) of the Union and each has been, to quote Baudenbacher (2004a, p. 385), "developed" by the Court of Justice "itself". Their development by the Court of Justice is outlined in chapter 4; did their development exceed the limits outlined by the *Bundesverfassungsgericht* to the "further development of law (*Rechtsfortbildung*)"?

Is the European Union in reality a judge-governed union? Are its judges pre-eminent? "The European Courts[41] are criticized for…enforcing a 'government of judges' from Luxembourg", José Manuel Barroso, the President of the European Commission, acknowledged in a speech on 31 March 2006 (Barroso, 2006, p. 5). The phrase "government of judges (*gouvernement des juges*)" was in the title of a book by Edouard Lambert (1866 – 25.10.1947) in 1921 on the American experience of judicial review of the constitutionality of statutes[42]. Judicial review (*contrôle judiciaire*) of the constitutionality of statutes (*lois*) is, Lambert (1921, p. 221) wrote, "both the organ for establishing and the instrument for exercising the political supremacy of judicial power". "It tends to assure" to the judiciary "the means to regulate, filter and curb (*régler, filtrer et endiguer*) the activity" of the legislature and the executive. There is, according

[40] „*Rechtsfortbildung überschreitet diese Grenzen, wenn sie deutlich erkennbare, möglicherweise sogar ausdrücklich im Wortlaut dokumentierte (vertrags-)gesetzliche Entscheidungen abändert oder ohne ausreichende Rückbindung an gesetzliche Aussagen neue Regelungen schafft*".

[41] The Court of Justice of the European Communities and the Court of First Instance of the European Communities.

[42] *Le gouvernement des juges et la lutte contre la législation sociale aux États-Unis. L'expérience américaine du contrôle judiciaire de la constitutionnalité des lois.*
The government of judges and the fight against social legislation in the United States. The American experience of judicial review of the constitutionality of statutes.

to Frédéric Dumon (20.4.1912 – 4.2.2000), "certainly *gouvernement des juges* when they exceed the mission which is theirs" (Dumon, 1976, p. III-51):

> "…when they ignore, violate, brush aside (*écartent*) the legal rules that they have the mission to respect and apply, when they found their decisions on their own philosophical, social or economic conceptions or those of the groups to which they belong, when their decisions are the result of 'choices', of 'policies', in respect of which the political powers – constituent, legislative – have not pronounced and which are not drawn from positive law, that is to say, from the legislation as a whole, from its spirit, from its evolution, from general or other principles" (Dumon, 1976, p. III-51).

The judge does not govern (*ne gouverne*) "when the political authority having made a choice, having taken a decision and having concretized it in a statute or in a regulation, he decides that this decision, that is to say, this choice, could not, according to the legal rules (*règles de droit*), be taken as it was or by the authority which enacted (*édictée*) it in a statute or in a regulation, because this particular decision falls within the powers of another authority or is interdicted by a rule that the statute or regulation has thus violated", Dumon (1976, p. III-51) argued. Is the Union a *Rechtsunion* or one governed by judges?

The Constitutional Court of the Republic of Lithuania recorded in its ruling of 11 July 2002[43] that it has "more than once…held…that the principle of a law-governed state implies, along with the other requirements, that the Constitution has the supreme legal power and that statutes (*įstatymai*), Government decrees (*Vyriausybės nutarimai*) and other legal acts must be in conformity with the Constitution, that the institutions exercising state authority and other state institutions must act *on the basis of law and in compliance with law*"[44] (emphasis added). The Constitutional Court, in its ruling of 25 November 2002[45], held: "Along with the other

[43] http://www.lrkt.lt/dokumentai/2002/r020711.htm
http://www.lrkt.lt/dokumentai/2002/n020711.htm

[44] The Constitutional Court added that "the principle of a law-governed state also implies that the institutions exercising state authority may not exceed the powers established for them in the Constitution, and that one institution of state authority may not interfere with the powers of another institution of state authority, which are established for the latter in the Constitution".

[45] http://www.lrkt.lt/dokumentai/2002/r021125.htm
http://www.lrkt.lt/dokumentai/2002/n021125.htm

requirements, the principle of a law-governed state[46]…also implies that *one must ensure human rights and freedoms*, that all institutions implementing state authority and other state institutions must act *on the basis of law and in compliance with law*, that the Constitution has the supreme legal power and that all legal acts must be in conformity with the Constitution" (emphasis added).

In "a law-governed state...legal norms must be clear, understandable and unambiguous", the Constitutional Court of the Republic of Slovenia said in paragraph 27 of Decision U-I-163/05 of 27 October 2005[47]. The Constitutional Court said in paragraph 45 of Decision U-I-277/05 of 9 February 2006 that a norm is not "unclear…merely because it does not give answers to all the questions which might appear in its practical application"; it is "unclear" only if "it is not possible to establish its contents" using "the established methods of…interpretation of legal norms…"[48]. Those established methods of interpretation are discussed in chapter 3.

Is the Union a state? "The EU is not a state but a union of democratic countries on which member states have conferred certain competences to attain objectives they have in common", Štefan Füle, the European Commissioner for Enlargement, told the European Parliament on 8 June 2010 in a answer "given…on the behalf of the Commission"[49]. The *Bundesverfassungsgericht*, in maintaining in paragraph 298 of its decision of 30 June 2009 in 2 BvE 2/08 that the Federal Republic of Germany "remains even after the entry into force of the Treaty of Lisbon a sovereign state (*ein souveräner Staat*)", used the state-theory (*Staatslehre*) of Georg Jellinek (16.6.1851 – 12.1.1911)[50]. With reference to the works of that same theorist the author demonstrates in chapter 2 that the European Union is a state – but not a sovereign one.

Burkhard Hess (2003, p. 46) of the University of Tübingen has defined "discretion" as "the power to select between different courses of action". The "discretion" of the judge, he said, "may be described as the power of the judge to select between different courses of action"

[46] Law-governed state is the official translation of the phrase *teisinė valstybė*.

[47] http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/B0A37244297A5682C125717200288E33
http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/70D8BE61C7B7D4F5C125717200288E89

[48] http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/3D07056BF402DA67C125717200288E87
http://odlocitve.us-rs.si/usrs/us-odl.nsf/o/5D0AB9DAD7E81FCCC125717200288EAC

[49] http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2010-2600&language=EN

[50]
http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2009/06/es20090630_2bve000208.html

(Hess, 2003, p. 66). That power is examined in chapter 6. Is it, as Hess (2003, p. 48) claimed, a "necessary" power?

"The Court of Justice has created structural features of outstanding importance: the unity of the European legal order, the efficiency of European law and the protection of individual rights", Manfred Zuleeg, a former Judge of the Court of Justice of the European Communities (7.10.1988 – 6.10.1994), asserted in 2001 (Zuleeg, 2001, p. 1). He also asserted – in 2001 – that "a constitution of the EU already exists" and that it consisted "not only of the treaties establishing and amending the European Communities and the Treaty on the European Union, *but also of judge-made law created by the ECJ*[51]" (Zuleeg, 2001, p. 1) (emphasis added). "The Court of Justice "developed…itself" the "constitutional principles" of precedence, direct effect and state liability "based on a free law attitude", Baudenbacher (2004, p. 385) claimed in an article published in 2004. That assertion will be evaluated in this thesis. Does the Court of Justice of the European Union have "a free law attitude"? Has the Court of Justice of the European Unuion "developed…constitutional principles" of Union law. Does it engage in law-creation (*Rechtsschöpfung*)? Do its judgements concerning the constitutional principles of the precedence of Union law, direct effect, state liability and the protection of fundamental rights indicate "a free law attitude"? Everson (2006, p. 12) apprehended in "Europe's law, both at national and European level…certain of the traits, or modes of legal interpretation that were argued for and suggested by the free law movement…". What are those "traits, or modes of legal interpretation"?

The free law movement existed from 1899 to the 1920s (Kommers, 1997, p. 525; Roßmanith, 1975, p. 120) in France, Austria and Germany. The social disorder and physical and economic devastation caused by the First World War, the deaths of most of its representatives by the late 1920s, the National Socialist takeover of power (*Machtübernahme*) in Germany in 1933 and a "misunderstanding" of what had been proposed (Grechenig & Gelter, 2008, p. 351) were, cumulatively, the reasons why the free law movement was discussed in the past tense by Kantorowicz in an article published in 1934[52] (Kantorowicz, 1934b, p. 1240-1241). During the period in which it was active the free law movement had, however, "produced the free law doctrine" (Kantorowicz, 1934b, p. 1240). The free law doctrine (Kantorowicz, 1934b, p. 1241; 1934a, p.232-233; 1928, p. 694-697) provides a descriptive framework for the case-law of courts.

[51] European Court of Justice (i.e., the Court of Justice of the European Union).

[52] He used the present tense when discussing the free law doctrine, however (Kantorowicz, 1934b, p. 1240).

According to Kantorowicz (1934b, p. 1241), the free law doctrine was "developed" by François Gény (17.12.1861 –16.12.1959) and "men like" Eugen Ehrlich, Ernst Fuchs (15.10.1859 – 10.4.1929), Josef Kohler (9.3.1849 – 3.8.1919), Max Ernst Mayer (2.7.1875 – 25.6.1923), Gustav Radbruch[53] (21.11.1878 – 23.11.1949), Theodor Sternberg (5.1.1878 – 18.4.1950) and Ernst Zitelmann (7.8.1852 – 28.11.1923). Kantorowicz himself was one of the movement's leaders (Kommers, 1997, p. 525). He briefly summarized the free law doctrine in an article published in English in 1934 (Kantorowicz, 1934b, p. 1241):

> "The free law doctrine teaches (if we may sum up an elaborate system in a few words): The traditional sources of the law, the 'formal' law, statutes and precedents, have gaps which must be filled up, must be filled up with law if the decision is to be a judicial decision, and this law must have a general character if equality before the law is to be maintained; the gap-filling material must therefore consist of rules, rules of law. These are 'free' law in the sense that they are not formal law: they have not been formalized but are still in a state of transition like…business customs, inarticulate convictions, emotional preferences. Many of them are formulated for the purpose of a concrete judicial decision by the courts, acting within their discretion, through acts of will and value-judgements[54], and constitute therefore judge-made law".

The "adherents of the movement…want in the main nothing more than to *state* (konstatieren): that the judge everywhere concludes not only from the statute, but also is and must be *praeter legem*[55] law-creatively active (praeter legem *rechtsschöpferisch tätig*)", Kantorowicz (1907, p. 1451) wrote in a review published in 1907 in the *Jahrbuch für Gesetzgebung, Verwaltung und Volkswirtschaft im Deutschen Reich*. He admitted in 1910, however, that "even among its own representatives…there exists some unclearness (*Unklarheit*)…about the true aims of this movement…" (Kantorowicz, 1911a, p. 285). The representatives of the free law movement "varied from one another considerably in their emphases and orientations" (Lind, 1999, p. 315). In 1923 Rudolf Stammler (19.2.1856 – 25.4.1938) complained that the "propositions" of the free law movement "are…not clearly set forth by its representatives" (Stammler, 1923b, p. 871).

[53] Radbruch was not an adherent of the free law movement (Kaufmann, 1965, p. 4; Paulson, 2006, p. 46; Foulkes, 1969, p. 396) but did contribute to the "develop[ment]" of the free law doctrine (Carter, 2005, p. 662-674).

[54] "Value-judgements do not let themselves be proved…" (Ehrlich, 1918f, p. 541).

[55] Alongside the statute.

The "propositions" of its main theorists are outlined in chapter 5. The translations by the author of German terms in the books and articles in the original German of the representatives of the free law movement are principally taken from three contemporaneous German-English dictionaries: Grieb-Schröer (1907), Flügel-Schmidt-Tanger (1907) and Muret-Sanders (1933).

The free law doctrine was devised to "counter" statutory positivism (*Gesetzespositivismus*) (Kokott, 1998, p. 68) and the *Begriffsjurisprudenz*[56] – concept jurisprudence – of the French exegetic school (*École de l'exégèse*) and the German pandectist school (*Pandektistik*) (Roßmanith, 1975, p. 120). *Gesetzespositivismus* and *Begriffsjurisprudenz* are both "incarnations" of legal positivism (Stelmach & Brożek, 2006, p. 220). *Gesetzespositivismus* involves "legal reasoning adhering only to the statutory text" (Kühn, 2004, p. 533-534). The "main representative" of *Gesetzespositivismus* in Germany was Karl Bergbohm (18.9.1849 – 12.11.1927) (Ott, 2002, p. 148). "All law is positive, all law is 'posited' (*gesetzt*) and only positive law is law", heinsisted (Bergbohm, 1892, p. 52). Law can only be posited (*gesetzt*) by a "competent law-creating power"[57], according to Bergbohm (1892, p. 549), and "even the basest statutory law, provided only its formally correct production, must be acknowledged as binding" (Bergbohm, 1892, p. 144). Thus "*any content whatsoever*" can be "turn[ed]…into law in the form of a statute" (Ott, 2002, p. 148). "The *existence* of a law is one thing: its *merits* or *demerits* are another thing", John Austin (3.3.1790 – 17.12.1859), with whose work Bergbohm was familiar, had said in *The Province of Jurisprudence Determined* (1832) (Austin, 1832, p. 278). "Whether a law *be*, is one enquiry: whether it *ought* to be, or whether it agree with a given or assumed test, is another and a distinct inquiry". The Hungarian legal theorist Felix Somló (1873 – 28.9.1920), a follower of John Austin, defined law as the norms of "the legal power (*der Rechtsmacht*)". He defined the *Rechtsmacht* as "an ordinarily followed, comprehensive and permanent, highest power" (Somló, 1917, p. 105) "or according to other terminologies: the law-maker, the state, the sovereign power" (Somló, 1917, p. 309). It is, Somló (1917, p. 308-309) wrote, incontestable that the *Rechtsmacht* "can posit *any* legal content, consequently is also able to determine any conditions for its validity" (emphasis added). In a famous article originally published in 1980 Dieter Grimm (2011a, p. 22), professor

[56] *Begriffsjurisprudenz* "gradually lost sight of all value foundation and, in the course of events, became a captive of…*Gesetzespositivismus*" (Mann, 1972, p. 96).

[57] There is, Ago (1957, p. 702) believed, "a vicious circle": "…the 'competence' of the authority creating law has no sense if it is not a legal competence established by law" but "law can only be the product of the law-making activity of a competent authority". "This vicious circle is no less evident when…other writers…say that the 'laying down' of law must come about according to certain predetermined productive processes, because the determination of these forms and the establishment of procedures can obviously only be the work of law".

of public law at Humboldt-Universität zu Berlin and a former Judge of the German *Bundesverfassungsgericht*, wrote:

> "Statutory positivism (*Gesetzespositivismus*) regarded the norm as the volitional act (*Willensakt*) of the state legislature, which bore its sense in itself (*Sinn in sich*) and was therefore to be understood without any recourse to the ideas and interests standing behind it or the social reality lying before it. The existence of such extra-legal factors (*außerrechtlicher Faktoren*) was indeed not denied, but legally-dogmatically declared to be meaningless. Statutory positivism appears in this way as the method of interpretation of unconditional loyalty to the statute (*die Auslegungsmethode der unbedingten Gesetzestreue*)"

"It is now taught that the jurist can decide any legal case by subsumption under the statute and for that reason alone must decide from it", Hermann Kantorowicz noted on 22 October 1910 in his presentation on legal science and sociology (*Rechtswissenschaft und Soziologie*) at the first conference of the *Deutsche Gesellschaft für Soziologie*[58] (Kantorowicz, 1911a, p. 279). Walter Becker (12.7.1905 – 6.6.1985) defined subsumption as "the synthesis, the bringing together in understanding, the act of concluding in the syllogism..." (Becker, 1951, p. 398). The judgement of a court was regarded "as a syllogism (*logischen Schluß*), in which a legal proposition (*Rechtssatz*) forms the major premise (*Obersatz*), the case in dispute (*Streitfall*) the minor premise (*Untersatz*), the judgement (*Urteilsspruch*) the conclusion (*Schlußfolgerung*)" (Ehrlich, 1913, p. 138). The choice of major premise "clearly determines which facts are going to be considered as legally relevant and which are not", Boštjan Zupančič, a Judge of the European Court of Human Rights, said in his dissenting opinion of 18 October 2006 in Hermi v. Italy (2006) 46 EHRR 1115. "A different choice of legal characterization brings different facts to the fore, or at least a different interpretation of the same facts"[59].

The exegetic school "identified law with legislation and refused to admit any source of law except legislation" (Bonnecase, 1930, p. 87). The only permissible "guide to interpretation" is "the intention of the legislature", the representatives of the exegetic school contended (Bonnecase, 1930, p. 86). This could be either "the real intention" or, if that cannot be determined, "the presumed intention" of the legislature. As Bonnecase, (1930, p. 87) remarked, "when we have got to that point there is no longer any limit to individual fancy".

[58] German society for sociology.

[59] See also his dissenting opinion of 27 June 2000 in Nuutinen v. Finland (2000) 34 EHRR 358.

The "proposition" (*Satz*) that "that which the legislature has intended is applicable (*es gilt dasjenige, was der Gesetzgeber gewollt hat*)" is, Josef Kohler (1906, p. 129-130) wrote, "completely wrong and completely contradictory to the history of human thought (*völlig verkehrt und völlig der Geschichte des menschlichen Denkens widersprechend*)"; in "our modern constitutional states…several factors participate (*mitwirken*) in legislation":

> "...when a statute comes into being it usually only comes into being in regard to the words; because what each of the legislative factors (*Faktoren der Gesetzgebung*)[60] thinks is behind those words is frequently something quite different; and also in one factor, the parliament, there are often as many opinions as fractions (*Fraktionen*)[61] and they are only united on one word-version (*Wortfassung*) because each fraction thinks that behind it is theirs".

If one wanted to take seriously "the thought of the legislature", Kohler (1906, p. 130) then "one would arrive at the proposition that with such internal contradictions (*inneren Widersprüchen*) a statute would never have come into being!"

The German pandectist school (*Pandektistik*) received its name from the Greek word for the Justinian *Digesta* (*Pandectae*) (Zimmermann, 2005, p. 5) and was the "offspring" of the historical school of Friedrich Carl von Savigny (21.2.1779 – 25.10.1861)[62] (Grote, 2005, p. 105). The most prominent theorists of the pandectist school were Georg Friedrich Puchta (31.8.1798 - 8.1.1846) and Bernhard Windscheid (26.6.1817 – 26.10.1892) (Alexander, 2002, p. 171). Heinrich Thöl (6.6.1807 – 16.5.1884), one of its early representatives, wrote that "legal propositions (*Rechtssätze*)" are found "from legal foundations (*rechtlichen Grundlagen*), by either finding from the individual statutory or customary legal propositions the higher legal proposition, the principle *(das Princip*), or drawing from a legal proposition its consequences" (Thöl, 1851, p. 140). Accordingly, one finds "legal propositions from other legal propositions,

[60] In the German *Kaiserreich* the Kaiser was a "legislative factor".

[61] The political groups in the parliament. For example, Rule 30 paragraph 1of the Rules of Procedure of the European Parliament states that members of the European Parliament "may form themselves into groups according to their political affinities". There were seven political groups (*Fraktionen*) in the European Parliament at the start of the 2014 – 2019 legislative period.

[62] The "basic tenets" of the historical school were outlined by von Savigny in 1814 in *Vom Beruf unsrer Zeit für Gesetzgebung und Rechtswissenschaft* (Of the vocation of our age for legislation and legal science) (Gale, 1982, p. 130-131; Rodes, 2004, p. 165). An English translation of the second (1828) German edition was published in 1831.

on legal grounds (*Rechtsgründen*), either through abstraction or through deduction" (Thöl, 1851, p. 140). The German Civil Code (Wolff, 1951, p. 222) is considered "a typical product of…pandectist scholarship…"[63] (Markesinis & Unberath, 2002, p. 26).

Rudolf von Jhering (22.8.1818 – 17.9.1892) satarized *Begriffsjurisprudenz* in *Im juristischen Begriffshimmel. Ein Phantasiebild*[64], an essay published in the collection *Scherz und Ernst in der Jurisprudenz*[65] (1884). In the "heaven of juridical concepts" to which von Jhering's scholar of Roman law dreams he has been transported following his death he is told that those concepts "have their own world in which they exist completely for themselves, far from every contact with life" (von Jhering, 1985, p. 802-803):

> "Concepts cannot tolerate contact with the real world. Everything connected with the real world must remain far from the place where concepts exist and reign".

What those who enter this "heaven" have in common is their "unshakable belief in the supremacy of concepts and abstract principles"; they are thus "completely shielded from the temptation of worrying about practical consequences" (von Jhering, 1985, p. 804). The scholar is introduced to the "hair-splitting machine (*Haarspaltemaschine*)" (von Jhering, 1885, p. 257), the "climbing pole of difficult juridical problems (*Kletterstange der schwierigen juristischen Probleme*)" (von Jhering, 1885, p. 257) and some of the "juridical machines (*juristischen Maschinen*)" (von Jhering, 1885, p. 260-263): the fiction apparatus (*Fiktionsapparat*), construction apparatus (*Konstruktionsapparat*), dialectic-hydraulic interpretation press (*dialektische-hydraulische Interpretationspresse*) and dialectical boring machine (*dialektische Bohrmaschine*).

The Austrian jurist Franz Bydlinski (20.11.1931 – 7.2.2011) concluded in 1999 that *Begriffsjurisprudenz*, which "insist[s] on systematic perfectionism and claim[s] to be capable of solving every legal problem by means of logical deduction in a multi-stepped pyramid of legal concepts and axioms", has "clearly discredited itself and today no longer needs to be refuted" (Bydlinski, 1999, p. 9).

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[63] The German Civil Code was promulgated on 18 August 1896 and entered into force on 1 January 1900 (Markesinis & Unberath, 2002, p. 23-24).

[64] *In the heaven of juridical concepts. A fantasy image*. An English translation of this essay was published in 1985.

[65] Jest and seriousness in jurisprudence.

In its ruling of 12 July 2001 the Constitutional Court of the Republic of Lithuania "held that one of essential elements of the principle of a law-governed state…is the principle of legal security (*teisinio saugumo*), which means the duty of the state to ensure the certainty and stability of legal regulation, to protect the rights of subjects of legal relations (*teisinių santykių subjektų*), including acquired rights, and to respect legitimate interests and legitimate expectations"[66]. This "principle" has two "aspects", the Constitutional Court said:

> "First, the imperative of legal security presupposes certain obligatory requirements for the legal regulation itself. It must be clear and harmonious, legal norms must be formulated precisely. Lower-level legal acts must not conflict with higher-level legal acts, and no legal act may conflict with the Constitution (*Žemesnio lygmens teisės aktai neturi prieštarauti aukštesnio lygmens teisės aktams, ir joks teisės aktas negali prieštarauti Konstitucijai*). Normative legal acts must be published (*paskelbiami*) in accordance with the established procedure and they must be accessible to all the subjects of legal relations. Second, this principle also includes several requirements related to the legal validity of the regulation. Under this principle the legal regulation may be amended only in accordance with a predetermined procedure and not in violation of (*nepažeidžiant*) constitutional principles and norms, it is necessary, *inter alia*, to comply with the principle *lex retro non agit*[67], amendments to the legal regulation cannot deny the legitimate interests and legitimate expectations of the individual, continuity of case-law must be ensured (*Pagal šį principą teisinį reguliavimą galima keisti tik laikantis iš anksto nustatytos tvarkos ir nepažeidžiant Konstitucijos principų ir normų, būtina* inter alia *laikytis principo* lex retro non agit, *teisinio reguliavimo pataisomis negalima paneigti asmens teisėtų interesų ir teisėtų lūkesčių, turi būti užtikrinamas jurisprudencijos tęstinumas*)".

"The principle of legal security (*teisinio saugumo*) must be followed by all institutions of state authority, in particular the *Seimas*[68] (*visų pirma Seimas*)…", the Constitutional Court declared in its ruling of 12 July 2001.

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[66] http://www.lrkt.lt/dokumentai/2001/r010712.htm
http://www.lrkt.lt/dokumentai/2001/n010712.htm

[67] Statutes are not retroactive.

[68] Assembly. The *Seimas* is the legislature of the Republic of Lithuania.

What is referred to as the principle of legal security (*teisinio saugumo principas*) in the Lithuanian language versions and the French and German language versions of the judgements of the Court of Justice of the European Union (*principe de sécurité juridique*; *Grundsatz der Rechtssicherheit*) is referred to as the principle of legal certainty (*principio di certezza del diritto*) in the English and Italian language versions. The "principle of legal certainty" is one of the general principles of Union law, the Court of Justice restated in paragraph 30 of the English language version of its judgement of 5 May 2011 in Joined cases C-201/10 and C-202/10 Ze Fu Fleischhandel GmbH (C-201/10) and Vion Trading GmbH (C-202/10) v. Hauptzollamt Hamburg-Jonas [2011] ECR I-3545. The Court of Justice interprets it differently to the Constitutional Court of the Republic of Lithuania. "The principle of legal certainty…requires that rules of law be clear and precise *and predictable in their effect*…", the Court of Justice said in paragraph 100 of its judgement of 8 December 2011 in Case C-81/10 P France Télécom S.A. v. European Commission 2011 ECR I-12899 (emphasis added). The "application" of "Community legislation…must be predictable for those who are subject to it", the Court of Justice held in paragraph 11 of its judgement of 22 February 1984 in Case 70/83 Kloppenburg v. Finanzamt Leer [1984] ECR 1075. How the law will be applied should be predictable. Is it?

The concept of extra-state law as defined by Eugen Ehrlich in *Grundlegung der Soziologie des Rechts* (1913) is examined in chapter 7 of this thesis. Ehrlich (1913, p. 9) regretted that "for centuries the…catch-word (*Schlagwort*)…customary law (*Gewohnheitsrecht*)" has "denoted (*bezeichnet*)…the whole, according to essence and origin uncommonly heterogeneous, extra-state law in its entirety"[69]. He wrote (Ehrlich, 1917c, p. 341):

> "The concept of customary law would be in itself suitable, however, to incorporate societal law at least outwardly in state law: because customary law is jurists' law or societal law that corresponds to the conditions that the state has established for its bindingness for courts and other authorities. That is why the vulgar state-based perception of law has always included customary law in state law: for it all law is either state law or state-approved law".

[69] „*...Gewohnheitsrecht – mit diesem Schlagworte wird schon seit Jahrhunderten das ganze, nach Wesen und Ursprung ungemein verschiedenartige, außerstaatliche Recht in Bausch und Bogen bezeichnet...*".

"There has never been a time when the law (*Recht*) promulgated by the state as a statute was the only law, not even for the courts and other authorities, and there was therefore always in existence an undercurrent that sought to provide to the extra-state law an appropriate position (*eine entsprechende Stellung*)", Ehrlich (1913, p. 11) argued. "The prevailing societal order is a work of great societal forces which can be conducted (*geleitet*) and tamed (*gebändigt*) by the state and its law but not suppressed (*unterdrückt*) or annihilated (*vernichtet*)" (Ehrlich, 1907, p. 41). Could an appropriate position (*eine entsprechende Stellung*) be provided to societal legal norms without contravening the principle of legal certainty?

This thesis is expositional and principally a work of translation. The translations that the author has made from other languages are literal translations. The phrase "literal translation"[70] has been defined by Jeremy Munday (2009, p. 204), professor of translation studies at the University of Leeds, as "the close adherence to the surface structures of the ST [source text] message both in terms of semantics and syntax". The "form and substance of the original text" is reconstructed "as closely as possible" (Šarčević, 2006, p. 28). "The only object and justification of translation is the conveying of the most exact information possible and this can be only achieved by a literal translation…", the writer Vladimir Nabokov (22.4.1899 – 2.7.1977) said in an interview in 1966[71] (Nabokov, 1990, p. 81). Raymond Saleilles (14.1.1855 – 3.3.1912), who was one of the translators of a French translation of the German Civil Code published in three volumes between 1904 and 1908[72] and who was associated with the free law movement[73], said in the introduction to that translation that "the method of rigorous exactitude" in translation "appeared the only that was worthy of a truly scientific work..." (Saleilles, 1904, p. xxxiv-xxxv).

[70] The phrase "is tautological since anything but that is not truly a translation but an imitation, an adaptation or a parody" (Nabokov, 2000, p. 77).

[71] Nabokov's annotated translation of Pushkin's novel *Onegin* was published in 1964.

[72] The translation was published by the Committee of Foreign Legislation (*Comité de législation étrangère*) established within the French Ministry of Justice.

[73] See the appendix to the Italian revised edition, published in 1908, of Kantorowicz's *Der Kampf um die Rechtswissenschaft*.

An article *Zum Problem der dreisprachigen Textierung der Bundesgesetze*[74] published in a Swiss law journal in 1918 advocated "the *clear, strictly correspondent* reproduction of the original text, by following the greatest possible *literalness* (*die* klare, streng sinngemäße *Wiedergabe des Urtextes, unter Befolgung möglichster* Wörtlichkeit)" (Cesana, 1918, p. 98)[75]. That has been the aim of the author in respect of the material he has translated in this thesis.

[74] On the problem of trilingual textualizing of federal statutes.

[75] The author of this article had in two articles published in the *Schweizerische Juristen-Zeitung* in 1910 discussed the "principles" and the "method" that to him "seemed the most suitable for rendering (*Uebertragung*) originally German-authored drafts or statutory texts" (Cesana, 1918, p.97; Šarčević, 1997, p. 281).

Chapter 2

The European Union "is not a state, it is a union of *states*", Robert Schütze, professor of European law at Durham University, wrote in discussing "the concept of the state" in the introduction to his book *European Constitutional Law* (2012, p. 2). "The European Union is neither sovereign nor a state", he insisted (2012, p. 152). He repeated later in this book that the Union "is not a state, it is a union of states" (Schütze, 2012, p. 189). The German Federal Constitutional Court (*Bundesverfassungsgericht*), in affirming in paragraph 298 of its decision of 30 June 2009 in 2 BvE 2/08 that the Federal Republic of Germany "remains even after the entry into force of the Treaty of Lisbon a sovereign state (*ein souveräner Staat*)" used the state-theory of Georg Jellinek (16.6.1851 – 12.1.1911). With reference to the works of Jellinek, whom Schütze (2012, p. 55-56) quoted and praised as "one of the most celebrated legal minds of the nineteenth century", and a 1931 lecture[76] by another German legal theorist, Hermann Kantorowicz (18.11.1877 – 12.2.1940), who was one of the representatives of the free law movement, the author demonstrates in this chapter that the European Union is a state – but not a "sovereign" one.

"A generally recognized theoretical construct for the peculiarity (*Eigenart*) of the EU does not yet exist"[77], according to a DVD[78] and website[79] published in June 2012 for *aktion europa*[80], an "initiative" of the German Federal Government, the European Parliament Information Office in Germany and the Representation of the European Commission in Germany "for the intensification of European-political public relations work (*Öffentlichkeitsarbeit*) in Germany". The European Union "does not correspond to any classical state-schema", the *aktion europa* publication asserts[81].

[76] "The concept of the state" is the title of Kantorowicz's lecture.

[77] „*Ein allgemein anerkanntes Theoriegebäude für die Eigenart der EU gibt es noch nicht*".

[78] *Europa heute. Die Europäische Union: Organe – Recht – Politik – Geschichte. Unterrichtsmaterial für die Erwachsenenbildung.*

[79] http://omnia-verlag.de/europa/DVD_Europa/start.html

[80] action europe. Its website is http://www.aktion-europa.de

[81] „*Sie entspricht keinem klassischen Staats-Schema*".

"The state possesses personality (*Der Staat besitzt Persönlichkeit*)", Georg Jellinek (16.6.1851 – 12.1.1911) wrote in *System der subjektiven öffentlichen Rechte*[82] (1892) in a chapter on the legal nature of the state. This is almost identical to the wording of the German language version of Article 47 of the Treaty on European Union: "The Union possesses legal personality (*Die Union besitzt Rechtspersönlichkeit*) (ABl. C 83 vom 30.3.2010, S. 83). "Personality", Jellinek wrote, "is the capacity to be able to have rights, in a word, legal capacity (*Rechtsfähigkeit*). It does not belong to the world of things as such (*Dinge an sich*), is not a being (*Sein*), but a relation of one subject to another and to the legal order" (Jellinek, 1892, p. 26). "The personality theory (*Persönlichkeitstheorie*) is of all theories of the state (*Staatstheorien*) today the most prevalent (*verbreitete*)", Gerhard Anschütz (10.1.1867 – 14.4.1948) noted in 1914 (Anschütz, 1914, p. 11). (Anschütz was of the opinion that this "prevalence (*Verbreitung*) corresponds to its intrinsic value".) Hermann Kantorowicz (18.11.1877 – 12.2.1940), too, viewed the state "as a subject of rights and duties, as a legal personality" (Kantorowicz, 1932, p. 5-6). "This legal personality" is, Kantorowicz said, "a *Gebietskörperschaft*, a territorial corporation", which he defined as "a corporation which has the competence… to rule [the] population inhabiting a certain territory…"[83]. The "competence of the corporation to impose its will, naturally includes the right to enforce its will" against "such of its members who do not consent", he "stress[ed]". It is, however, not "sufficient to say that a state is a corporation endowed with the competence to rule a population inhabiting a certain territory" because this "would apply to subordinate political and social units which likewise have such a competence but are not considered states, but merely administrative units of a state…" (Kantorowicz, 1932, p. 6-7). The "question" of "where distinction between states and other territorial corporations, not possessing statehood, ought to be drawn" is thus one that must be "approach[ed]"[84]. Kantorowicz (1932, p. 7) indicated that "the traditional answer" to this question (i.e., that "the distinction lies in the sovereignty of the state, and the non-sovereignty of its administrative units") had to be "abandoned" because "it has proved to be necessary to recognize states without sovereignty". For that reason the "question", which Kantorowicz (1932, p. 7) admitted was "difficult", had "become more so…".

[82] System of subjective public rights.

[83] "If we do not employ this element of territoriality…we could not distinguish a state, for instance, from a Church" (Kantorowicz, 1932, p. 6).

[84] "It is this distinction which certain German jurists mean when they speak of *Staatsgewalt*...as opposed to mere *Herrschgewalt*…". *Herrschgewalt* can be translated as ruling authority or authority to rule. (The word *herrschen* means "to rule" (Schmidt & Tanger, 1907, p. 457; Baumann, 1933, p. 509) and a *Herrscher* is a "ruler" (Grieb & Schröer, 1907, p. 490; Baumann, 1933, p. 509)).

"The boundary between non-sovereign and sovereign states can…be easily drawn", Georg Jellinek (16.6.1851 – 12.1.1911) wrote in *Allgemeine Staatslehre*[85] (1900) (Jellinek, 1900, p. 451):

> "Sovereignty is the capability (*Fähigkeit*) of exclusive legal self-determination. Therefore only the sovereign state can within self-imposed or self-recognized legal limits regulate with complete freedom the content of its responsibility (*Zuständigkeit*). The non-sovereign state on the other hand is also free to determine, as far as its state-sphere reaches. Determinability or obligability (*Bestimmbarkeit oder Verpflichtbarkeit*) through its own will is the characteristic of every independent sovereign power. Hence the non-sovereign state also has legal power over its competence. But this power has its limits (*Grenzen*) in the law of the superordinate commonwealth. Of two permanently associated states that which cannot through its own statutes extend its constitutional responsibility (*staatsrechtliche Zuständigkeit*), but finds in the legal order of another state a limit to its competence-enlargement (*Kompetenzerweiterung*) is therefore non-sovereign, while the state that through its statutes is able to deprive (*entziehen*) the other of its constitutional competences is sovereign".

"The sovereignty of the superior state with respect to the non-sovereign state reveals itself in three ways", Jellinek (1887, p. 203) wrote in *Gesetz und Verordnung*[86]:

> "...first in the negative control of the state activity (*Staatsthätigkeit*) of the latter, then in the possibility to use it for the purposes of the sovereign state, either as a direct object of its will, or as a communal association (*Communalverband*) vested (*ausgestatteter*) with relative independence. Finally, by the fact that the sovereign state has the right at any time to draw to itself under observation of the constitutional forms the supremacy-rights (*Hoheitsrechte*[87]) as in its potential sphere pertaining to the non-sovereign state. The state existence (*staatliche Existenz*) of the non-sovereign state itself is

[85] General theory of the state.

[86] Statute and prescription.

[87] Translated as "rights of supremacy" in Williams & Lauterpacht (1932, p. 99) but often mistranslated as "sovereign rights" or "rights of sovereignty": see, again, Williams & Lauterpacht (1932, p. 99)!

> therefore situated (*gestellt*) in the sovereign will of the suzerain (*Oberstaat*). The sovereign state can expropriate the non-sovereign state, without any *a priori* formal legal limit being set therein".

Jellinek (1882, p. 34), in *Die Lehre von den Staatenverbindungen*[88], defined a sovereign state as a state that "can be legally bound only by its own will". The Czech Constitutional Court quoted in paragraph 107 of judgement Pl. ÚS 19/08 of 26 November 2008[89] a corresponding definition of sovereignty in a Czech legal dictionary – the "independence of the state power from any other power, both externally (in foreign relations), and in internal matters" (Hendrych et al., 2003, p. 1007) – but the Court then observed that sovereignty "is (probably) no longer understood like this in any traditional democratic country, and *stricto sensu*[90] no country…would fulfill the elements of sovereignty". "It is more a linguistic question whether to describe the integration process" of the European Union "as a 'loss' of part of sovereignty, or competences, or, somewhat more fittingly, as, e.g., 'lending, ceding' of part of the competence of a sovereign", the Czech Constitutional Court said in paragraph 98. "It may seem paradoxical that the key expression of state sovereignty is the ability to dispose of one's sovereignty (or part of it), or to temporarily or even permanently cede certain competences"[91]. The concept of competence is not defined in the Treaty on European Union or the Treaty on the Functioning of the European Union but according to Schütze (2009, p. 65) "[l]egal competences refer to 'legal ability'. Competences are thus potentialities"[92]. A "competence" is "the *material field* within which an authority is entitled to exercise power" (Schütze, 2009, p. 65). The "ability of a member state to withdraw" from the Union "confirms…the continuing sovereignty" of the member states, the Czech Constitutional Court held in paragraph 106 of judgement Pl. ÚS 19/08 of 26 November 2008.

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[88] The theory of associations of states.

[89] http://www.concourt.cz/clanek/pl-19-08

[90] In the strict sense.

[91] The Czech Constitutional Court held in paragraph 108 that "the transfer of certain state competences, that arises from the free will of the sovereign, and will continue to be exercised with the sovereign's participation in a manner that is agreed on in advance and that is reviewable, is not a conceptual weakening of the sovereignty of a state, but, on the contrary, can lead to strengthening it within the joint actions of an integrated whole. The EU's integration process is not taking place in a radical manner that would generally mean the 'loss' of national sovereignty; rather, it is an evolutionary process and, among other things, a reaction to the increasing globalization in the world".

[92] "The concept of competence is distinct from and broader than the totality of legal acts emanating from it" (Schütze, 2009, p. 65).

The member states of the European Union have "merely assumed the obligation to jointly conduct state duties in areas of cooperation, and as long as they maintain full ability to specify the forms of conducting state duties, which is concurrent with the competence to 'determine competences' [*Kompetenz-Kompetenz*], they remain – in the light of international law – sovereign subjects", the Polish Constitutional Tribunal stated in its judgement of 24 November 2010, Ref. No. K 32/09[93]. The Polish Constitutional Tribunal said that it "shares the view" that "as regards the conferred competences, the states have renounced their powers to take autonomous legislative actions in internal and foreign relations, which however does not lead to permanent limitation of sovereign rights of these states…". The Constitutional Tribunal accepted that "sovereignty is no longer perceived as an unlimited possibility of exerting influence on other states or as manifestation of power that is free from external influences – on the contrary, [the] freedom of activity of a state is subject to international-law restrictions"[94].

"Sovereignty… is a very ambiguous expression for a sometimes very mischievous thing", Kantorowicz (1932, p. 7) remarked. As "a quality of the state in its internal and constitutional sense" sovereignty, he said, "simply means that a state must not be subject to the ruling power of any other state": "In this sense the members of a federa[l] state, although states themselves, cannot be called sovereign, for it is of the essence of a federa[l] state, that federal law overrides state law". He pointed out that the "kingdoms and principalities" of the German *Kaiserreich* were "not sovereign states, but scarcely anybody would hesitate to call them states"[95] (Kantorowicz, 1932, p. 7). The "essential element" of stateness is not "sovereignty" and sovereignty is an "expression" that should be "reserved…for denoting a certain type of state", Kantorowicz (1932, p. 8) argued.

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[93] http://www.trybunal.govpl/eng/summaries/documents/K_32_09_EN.pdf

[94] "In the view of the Constitutional Tribunal, the concept of sovereignty as the supreme and unlimited power, both as regards the internal relations within the state and its foreign relations…is subject to changes corresponding to developments that have been taking place in the world in the last few centuries. The changes stem from the democratization of the decision-making process in the state, due to the replacement of the principle of sovereignty of the monarch with the principle of supremacy of the nation, bound by the human rights which arise from the inviolability of human dignity. They also stem from the increase of the role of international law, as a factor shaping international relations; they result from the development of the process institutionalization of international community, as well as they are a consequence of globalization and a consequence of European integration".

[95] "Surely the King of Bavaria was not the first civil servant of a province of the German Empire, but the monarch of a state, although not of a sovereign state. Naturally nobody can be prevented from calling this competence to rule 'sovereignty'…in which case it would be a contradiction to speak of non-sovereign states. This, however, would force us to speak of sovereign states composed of a number of other sovereign states, and to accept the no less awkward idea of a 'divided sovereignty' in the sense, that the member states of a federal state are competent to rule with regard to certain matters and be themselves under the rule of another state, namely the federal state, with regard to other matters" (Kantorowicz, 1932, p. 7).

If "sovereignty" is "abandon[ed]" as "the characteristic of a state as opposed to a mere administrative unit…how are we to describe the distinction" between a state and an "administrative unit" (Kantorowicz, 1932, p. 8)? Kantorowicz said he could not "accept the usual German solution of this problem, as, for instance, given by our leading authority, Professor [Gerhard] Anschütz". He quoted Anschütz's commentary on the Constitution of 11 August 1919 of the German Reich (Anschütz, 1933, p. 39): "What distinguishes the state from the non-state…is not sovereignty (independence from without and above) but the originality, the autonomy (*Eigenständigkeit*) of the authority to rule (*Herrschaftsgewalt*)"[96]. (Anschütz maintained that under both the Constitution of 16 April 1871 and the Constitution of 11 August 1919 the individual German states, "now called *Länder*[97], [had] not forfeited (*eingebüßt*) their stateness (*Staatlichkeit*) by their affiliation to the Reich" (Anschütz, 1933, p. 39-40).) Kantorowicz (1932, p. 9) referred to this "prevailing" theory as "the theory of originality"[98]. The theory of the originality of stateness could not "explain" why both the member states of the German *Kaiserreich* and the *Kaiserreich* itself "possessed" stateness (Kantorowicz, 1932, p. 9). The *Kaiserreich*, because its stateness was "not original and self-determined, but…determined by legal acts of other states", was, if the "criterion" of originality is used, "no state at all" (Kantorowicz, 1932, p. 9). The *Bundesverfassungsgericht* employed the "criterion" of originality when it held in paragraph 231 of its decision of 30 June 2009 in 2 BvE 2/08 that the functional "constitution" (*Verfassung*) of the European Union is "a derived fundamental order (*abgeleitete Grundordnung*)":

> "It establishes a supranational autonomy which undoubtedly makes considerable inroads into everyday political life but is always limited factually. Here, autonomy can only be understood...as an autonomy to rule which is independent but derived, i.e. is granted by other legal entities. In contrast, sovereignty under international law and public law requires independence from an external will precisely for its constitutional foundations (*konstitutionellen Grundlagen*)".

[96] „*Denn was den Staat vom Nichtstaat, insbesondere von der Gemeinde, abhebt, ist nicht die Souveränetät (Unabhängigkeit nach außen und oben), sondern die Ursprünglichkeit, die Eigenständigkeit der Herrschaftsgewalt*".

[97] Countries.

[98] It "corresponds", he said, "to the idea of a god-creator of the universe – himself not created".

Kantorowicz (1932, p. 9) saw that while "most German jurists reject[ed]" the "deduction" that the *Kaiserreich* was not a state "nearly all" of them were "rightly agreed" that the member states of the *Kaiserreich* had "retained" their stateness but "not their sovereignty". He proceeded to describe other "phenomena" that also could not be "explain[ed]" by the theory of the originality of stateness (Kantorowicz, 1932, p. 9-12).

The "characteristic" of stateness for Kantorowicz (1932, p. 12) is "the *Unentziehbarkeit* of the competence to rule":

> "…by this German word which literally translated would be 'indeprivability', I mean: that a body politic cannot by law be deprived of its competence to rule without its own consent. Such a competence to rule I propose to call an 'inviolable' one and if the competence to rule of a territorial corporation possesses this inviolability, I call it a state, no matter whether the competence is an original or a delegated one. In sovereignty this inviolability is, of course, implied, but even a non-sovereign state, if it is to be called a state at all, would have to possess it. If, on the other hand, the competence to rule is violable in the above sense, that is, if the body can by law be deprived of it without its consent, then it would not even be a non-sovereign state, but a mere administrative unit".

Kantorowicz (1932, p12) then defined "the concept of the state" as "a territorial corporation endowed with an inviolable competence to rule…". In an article published in 1927 on the German Constitution of 11 August 1919 Kantorowicz (1927, p. 45) asserted that "the criterion between state and province must not be sought in the origin of their power but in its legal inviolability": "A state remains a state if its power, even though very limited, and subject to an ever-increasing limitation, may not be by law entirely annihilated without its consent"[99].

[99] Kantorowicz (1932, p. 12-13) explained that he was "speaking of inviolability by law, and not of force disguised as law; this would be the case if, after an unfortunate war, a federal state were forced by the peace treaty to cede one of its member states without the latter's consent to the victor. Nor would it follow from my definition that a federal state could not by law undermine the functions of its member states or abolish these functions one after the other, as long as it continued to grant them a minimum of proper competence…".

One of the "consequences" of this concept, Kantorowicz (1932, p. 13) continued, is the implication that every territorial corporation possessing stateness "must be endowed with *Gebietshoheit*". Kantorowicz used that "expression" solely to denote "territorial inviolability": "…no state may by law and without its consent be incorporated in another state, or be united with other states to form a new one, or be divided among several other existing states, or be so divided, that the parts each form a new state, or be deprived of a part of its territory". He said that "only" the "positive law…of the different composite states…can tell us whether such alterations of their territory are legally possible or not" (Kantorowicz, 1932, p. 14). If "the whole is legally protected against the secession of its members" it is "a state" and not "a mere union of states". If "the members are legally protected against *territorial* encroachments on the part of the whole" they are "states" and not "mere administrative units" (emphasis added). The terms used to designate the whole (for example, *Bund* or "Union") and the members (states, provinces, cantons or *Länder*) are not "decisive".

Kantorowicz misapprehended *Gebietshoheit*; this misapprehension is evident from his mistranslation of this "expression" as "territorial competence" (Kantorowicz, 1932, p. 13) when it really means "territorial supremacy". "*Gebietshoheit* (territorial supremacy)" is distinct from "*territoriale Souveränität* (territorial sovereignty)" (Verdross, 1959, p. 203):

> "Territorial sovereignty (*territoriale Souveränität*) is usually confounded with territorial supremacy (*Gebietshoheit*). In truth however both concepts do not coincide. This results from the fact that a state can possess territorial sovereignty over a certain territory at the same time another state exercises territorial supremacy".

In discussing the "distinction" between territorial sovereignty and territorial supremacy Kunz (1950, p. 558) cited "Bosnia (1878 – 1908)"[100]. Under Article 25 of the Treaty of Berlin (1878) the Ottoman provinces of Bosnia and Herzegovina were "occupied and administered by Austria-Hungary" (Hertslet, 1891, p. 2780) but, as the Convention of 21 April 1879 between Austria-Hungary and the Ottoman Empire confirmed, "the fact of the occupation of Bosnia and the Herzegovina in no way affect[ed] the rights of sovereignty of…the [Ottoman] Sultan over these provinces…" (Hertslet, 1891, p. 2855); Austria-Hungary had "territorial supremacy" but not "territorial sovereignty". Kunz (1950, p. 558-559) explained the "distinction":

[100] See also Jellinek (1882, p. 53-54).

> "He who...has only territorial supremacy is not the sovereign. He has only, to state it in the words of the Panama Treaty of 1903, all the rights 'as if he were sovereign'[101], but not *of* the sovereign; the right of sovereignty, although perhaps only a *nudum jus*[102], can be in another state. Only the sovereign has the *jus disponendi*[103] over the territory, not he who has mere territorial supremacy".

Jellinek (1882, p. 53) believed that "it follows from the essence (*Wesen*) of sovereignty, that the delegation…of the weightiest supremacy-rights (*der wichtigsten Hoheitsrechte*) of a state to one other does not rob the first of sovereignty (*Souveränetät*)". "A state may even assign (*abtreten*) the exercise of all supremacy-rights (*Hoheitsrechte*) to one other, yet not thereby cease to be sovereign". Jellinek (1882, p. 54) appreciated that "sovereignty can exist as a bare right (*nudum jus*)…".

In the European Union "the whole" is not "legally protected against the secession of its members"[104] but "territorial inviolability", as defined by Kantorowicz (1932, p. 13), is not "of decisive importance". The Union has territorial supremacy (*Gebietshoheit*) but not territorial sovereignty (*territoriale Souveränität*).

[101] A reference to Article III of the Convention of 18 November 1903 between the United States of America and the Republic of Panama "for the construction of a ship canal to connect the waters of the Atlantic and Pacific oceans" (known as the Hay – Bunau-Varilla Treaty): "The Republic of Panama grants to the United States all the rights, power and authority within the zone mentioned and described in Article II of this agreement, and within the limits of all auxiliary lands and waters mentioned and described in said Article II which the United States would possess and exercise if it were the sovereign of the territory within which said lands and waters are located to the entire exclusion of the exercise by the Republic of Panama of any such sovereign rights, power or authority" (Brant & Maycock, 1906, p. 534-535). This "territory" was described as "the territory of the Republic of Panama under the jurisdiction of the United States of America" in a subsequent treaty (Bevans, 1972, p. 745). "The United States, *without becoming the sovereign*, received the *exclusive use* of the rights of sovereignty…", Philippe Bunau-Varilla, who had drafted the Convention of 18 November 1903, explained in his memoirs (Bunau-Varilla, 1940, p. 158). Under the Panama Canal Treaty of 7 September 1977, which "terminate[d] and supersede[d]" the Convention of 18 November 1903, "the Republic of Panama, *as territorial sovereign*, grant[ed] to the United States of America" until 31 December 1999 "the rights necessary to regulate the transit of ships through the Panama Canal, and to manage, operate, maintain, improve, protect and defend the Canal" (Department of State, 1987, p. 48-49) (emphasis added).

[102] Bare right.

[103] Right of disposing.

[104] See Article 50 of the Treaty on European Union (OJ C 83, 30.3.2010, p. 43-44).

The three "elements of the state", according to Georg Jellinek (1900, p. xvii-xviii; 355-393), are state territory (*Staatsgebiet*), state people (*Staatsvolk*) and state authority (*Staatsgewalt*). "A state is…a commonwealth (*Gemeinwesen*) with its own territory, its own subjects and its own authority to rule (*Herrschergewalt*), which is either independent of any external power, so sovereign, or restricted in various directions by the authority to rule (*Herrschergewalt*) of a higher sovereign state entity, therefore non-sovereign. All three parts are necessary for the existence (*Dasein*) of the state…" (Jellinek, 1896, p. 12). "After the entry into force of the Treaty of Lisbon, the Federal Republic of Germany will…remain a sovereign state…", the *Bundesverfassungsgericht* stated in paragraph 298 of its decision of 30 June 2009 in 2 BvE 2/08[105]: "The substance of German state authority (*Staatsgewalt*), including the constituent power[106], is protected, the German state territory (*Staatsgebiet*) remains assigned only to the Federal Republic of Germany, there are no doubts concerning the continued existence of the German state people (*Staatsvolk*)". "Sovereign state authority (*souveräne Staatsgewalt*) is preserved according to the rules on the distribution and delimitation of competences", the *Bundesverfassungsgericht* said in paragraph 299. "The continued existence of sovereign state authority is also shown in the right to withdraw from the European Union and is protected by the Federal Constitutional Court's right of last decision (*Letztentscheidungsrecht*)", it added. (The latter right is not recognized in Union law.) The *Bundesverfassungsgericht* reiterated in paragraph 229 that the German *Grundgesetz* "prohibits the transfer" to the European Union "of competence to decide on its own competence (*Kompetenz-Kompetenz*)". "Territory-related state authority (see Jellinek, *Allgemeine Staatslehre*, 3rd ed. 1921, p. 394) continues to exist unchanged", the *Bundesverfassungsgericht* held in paragraph 344: "The European Union exercises supreme authority (*Hoheitsgewalt*) in Germany on the basis of the competences transferred to it in the Act Approving the Treaty of Lisbon (*Zustimmungsgesetz zum Vertrag von Lissabon*[107]), and thus not without express permission of the Federal Republic of Germany". "The Act Approving the Treaty of Lisbon (*Zustimmungsgesetz zum Vertrag von Lissabon*) does not abandon (*gibt auf*) the state territory of the Federal Republic of Germany", the *Bundesverfassungsgericht* immoderately declared. The European Union "does not have comprehensive territorial authority which replaces that of the Federal Republic of Germany", the *Bundesverfassungsgericht* said (more soberly) in paragraph 345:

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http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2009/06/es20090630_2bve000208.html
http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2009/06/es20090630_2bve000208en.html

106 The *verfassungsgebende Gewalt*. In French, the *pouvoir constituant*.

107 Literally, approval statute for the Treaty of Lisbon. A statute of the German legislature.

> "That it does not claim such authority even after the entry into force of the Treaty of Lisbon is shown by the fact that the treaty only makes reference to a 'territorial scope' of the treaties (Article 52 Lisbon TEU; Article 355 TFEU). The territorial scope is ancillary to the state territory of the member states, which in its sum determines the area of application of Union law (Article 52 Lisbon TEU; Article 355 TFEU). There is no territory belonging directly to the Union which would be free from this ancillary nature…".

"The people belonging to (*zugehörigen*) the state form in their totality the state people (*Staatsvolk*)", Jellinek (1900, p. 366) wrote in *Allgemeine Staatslehre*. The *Staatsvolk* is "create[d]" by the state and "something completely different from the people in a national sense, which is exclusively a work of society", Eugen Ehrlich (1913, p. 305 asserted. The French Constitutional Council (*Conseil constitutionnel*), in Décision n° 91−290 DC of 9 May 1991, declared "unconstitutional" Section 1 of the Act on the statute of the territorial collectivity of Corsica (*Loi portant statut de la collectivité territoriale de Corse*) because it "referr[ed]" to "the Corsican people" and the French Constitution "recognizes only the French people, made up of all French citizens regardless of origin, race or religion". Rigaux (2002, p. 1) criticized the decision for "disregard[ing] the polysemy of the word 'people' ": "It is assumed that within the *Staatsvolk* there does not exist any collective character which singularizes as such a group of citizens". "There is not, in my view, a single European *demos* [people]", the British Prime Minister, David Cameron, said in his speech of 23 January 2013 on the future of the European Union[108] – also "disregard[ing] the polysemy of the word 'people' ".

"After the ratification of the Treaty of Lisbon, the Federal Republic of Germany will continue to have a state people (*Staatsvolk*)", the German *Bundesverfassungsgericht* said in paragraph 346 of its decision of 30 June 2009 in 2 BvE 2/08:

> "The concept of the 'citizen of the Union'…is exclusively founded on Treaty law. The citizenship of the Union is solely derived from the will of the member states and does not constitute a people of the Union (*Unionsvolk*), which would be competent to exercise self-determination as a legal entity giving itself a constitution".

[108] For the text of this speech see https://www.gov.uk/government/speeches/eu-speech-at-bloomberg

"Citizenship of the Union...is a derived (*abgeleiteter*) status additional (*ergänzender*) to national citizenship…", the *Bundesverfassungsgericht* said in paragraph 348, and it concluded in paragraph 350 that "the German state-people (*deutsche Staatsvolk*) retains its existence as long as the citizenship of the Union does not replace the citizenships of the member states or is superimposed on it".

The German *Bundesverfassungsgericht* sees the European Union as a "compound of states (*Staatenverbund*)". It defined the "concept of *Verbund*" in paragraph 229 of its decision of 30 June 2009 in 2 BvE 2/08: "The concept of *Verbund* covers a close long-term association (*Verbindung*) of states which remain sovereign, an association which exercises public authority on the basis of a treaty, whose fundamental order, however, is subject to the disposal of the member states alone and in which the peoples – that is to say, the citizens belonging to the state (*das heißt die staatsangehörigen Bürger*) – of the member states remain the subjects of democratic legitimation".

Form and *Natur* are separable. On 30 October 1866 Bismarck wrote a memorandum in which he criticized the three existing drafts of the Constitution of the North German Confederation (*Norddeutscher Bund*)[109]. "One will need to hold more to the form of the union of states (*Staatenbund*), but in practice give this the nature (*Natur*) of the federal state (*Bundesstaat*) with elastic, inconspicuous, but far-reaching expressions"[110], he said (von Keudell, 1901, p. 326; Kolb, 2009, p. 78). Gerhard Anschütz (2000, p. 136), in a speech at the University of Heidelberg on 22 November 1922, explained that "this did not mean that the structure…should be a union of states but instead that it should as far as possible simply *resemble* a union of states, because (we may add this in revealing the motive) the dynastic and other particularisms with which we must deal would otherwise become uneasy".

"The EU is not a state…", the European Commissioner for Enlargement, Štefan Füle, told the European Parliament on 8 June 2010 said in an answer "given…on the behalf of the Commission" to a question the premise of which was that the Union is a state[111]. The premise of the question was doctrinally correct. The European Union "corresponds" to the schema of a non-sovereign state.

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[109] An English translation of the Constitution of 25 June 1867 of the *Norddeutscher Bund* was included in volume 57 of *British and Foreign State Papers* (Hertslet, 1871, p. 296-313).

[110] „*Man wird sich in der Form mehr an den Staatenbund halten müssen, diesem aber praktisch die Natur des Bundesstaates geben mit elastischen, unscheinbaren, aber weitgreifenden Ausdrücken*".

[111] Written Question E-2600/10 to the Commission (20 April 2010).

The European Union is a non-sovereign state (*nichtsouveräne Staat*). "Only through the will of the sovereign state can (*können*) non-sovereign be formed…", Jellinek (1882, p. 46) wrote in *Die Lehre von den Staatenverbindungen*. The European Union was "formed…through the will" of "sovereign" states. The European Union is "analogous to a state (*staatsanalog*)…but does not have the characteristics of a federal state (*nicht bundesstaatlich geprägt ist*)" the *Bundesverfassungsgericht* erroneously asserted on 6 July 2010 in 2 BvR 2661/06 in paragraph 65. The Union has the "characteristics" of a non-sovereign state and is "analogous" to a federal state (*bundesstaatsanalog*). The principle (*Grundsatz*) of loyal cooperation (*loyale Zusammenarbeit*; *coopération loyale*) in Article 4 paragraph 3 of the Treaty on European Union (ABl. C 83 vom 30.3.2010, S. 18), for instance, corresponds to the principle of federal loyalty (*Bundestreue*) in German constitutional law[112]. As Advocate General Juliane Kokott said in paragraph 24 of her opinion of 11 November 2004 in Case C-105/03 Criminal proceedings against Maria Pupino [2005] ECR I-5289, "the member states...have an obligation of loyalty to the Union (*die Mitgliedstaaten...zur Unionstreue verpflichtet*)". *Unionstreue* is an "obligation" that is "incumbent" on the institutions of the Union and on the member states. In its order of 13 July 1990 in Case C-2/88 Imm. J.J. Zwartveld and others [1990] ECR I‑3365 the Court of Justice stated in paragraph 23 that because it has to ensure that the law is observed it "must…have the power to review" whether or not the obligation of loyal cooperation (*Verpflichtung zur loyalen Zusammenarbeit*) "has been complied with". "The state…actually creates, at least in part through its law, the people of the state (*Staatsvolk*)", Ehrlich (1913, p. 305; 1936, p. 378) wrote. "This is of course something quite different from the people in the national sense (*das Volk im nationalen sense*), which is exclusively a creation of society". The European Union has a *Unionsvolk*[113] created by Union law and in particular citizenship of the Union. A "citizen of the Union…may…rely on the rights conferred on those having that status, including against his member state of origin", the Court of Justice "recalled" in paragraph 18 of its judgement of 24 October 2013 in Case C-220/12 Andreas Ingemar Thiele Meneses v. Region Hannover [2013] ECR I-0000. The Court added in paragraph 19 that it "has held on numerous occasions" that "the status of citizen of the Union is destined to be the fundamental status of nationals of the member states…".

[112] The *Bundesverfassungsgericht* has described *Bundestreue* as an "immanent constitutional norm (*immanenten Verfassungsnorm*)" (BVerfGE 6, 309, 361). In the Belgian Constitution federal loyalty is an explicit constitutional norm: "In the exercise of their respective responsibilities, the federal State, the Communities, the Regions and the Joint Community Commission act with respect for federal loyalty, in order to prevent conflicts of interest" (see Article 143, Section 1) (Belgian House of Representatives, 2012, p. 44).

[113] See the chapter by Schmitz (2012) on *Staatsvolk und Unionsvolk in der föderalen Supranationalen Union*.

The European Union is a non-sovereign state. The conception of the Union as a state is important in the context of this thesis in two respects:

1. As the Union is a state Union law is state law. The references to "state law" in the section in chapter 5 on Eugen Ehrlich and in chapter 7 on his concept of extra-state law should therefore be construed as including Union law.

2. If the Union is a *Rechtsunion* it is a *Rechtsstaat*. According to Article 2 of the Dutch language version of the Treaty on European Union (PB C 83, 30.3.2010 van 30.3.2010, blz. 17) "*de rechtsstaat*" is one of the "values" on which the Union is based. The word "state" is also used in expressing this "value" in, for example, the Italian (*dello Stato di diritto*), Portuguese (*do Estado de direito*), French (*l'État de droit*), Spanish (*Estado de Derecho*), Danish (*retsstaten*) and Swedish (*rättsstaten*) language versions of Article 2. A *Rechtstaat*/*rechtstaat*/*retsstat*/*rättsstat* is a state governed by law. The "important question" of whether or not this concept can be applied "in the context of the European Union" has been "answered…in the affirmative" in Article 2 of the Treaty on European Union, the Vice-President of the European Commission, Viviane Reding, said in a speech in Brussels on 4 September 2013 (Reding, 2013, p. 3). In the Dutch language versions of judgements in which, in the German language versions, it characterizes the Union as a *Rechtsunion* the Grand Chamber of the Court of Justice describes the Union as "a union that is governed by law (*een unie is die wordt beheerst door het recht*)".

Is the Union governed by law? That is a question that will be addressed in the following chapters.

Chapter 3

"It would be a mistake to understand interpretation as a neutral operation to discover a pre-established meaning of the norm", Dieter Grimm (2010, p. 40), professor of public law at Humboldt-Universität zu Berlin and a former Judge of the *Bundesverfassungsgericht*, advised: "Interpretation of the general law with regard to a concrete problem always contains an element of constituting the meaning…". This chapter outlines the recognized methods of interpretation of legal propositions and the concept of the "further development of law (*Rechtsfortbildung*)" by judges.

The Court of Justice of the European Union, Baudenbacher (2004b, p. 22) confirmed, "applies the same methods of interpretation as the national supreme courts of the member states". In his *Thesen zu den Methoden der Auslegung des Gemeinschaftsrechts, aus der Sicht eines Richters*[114], Hans Kutscher (1976b, p. I-15), then a Judge of the Court of Justice of the European Communities, described the following methods of interperation: literal (*grammatische*), historical, legal-comparative, systematic (*systematische*) and teleological.

It is, Kutscher (1976a, p. I-17; 1976b, p. I-18) began, "obvious" that "every interpretation of a norm has to start with its wording and the usual sense (*üblichen Sinn*) of a word, phrase or sentence, and its meaning (*Bedeutung*) according to ordinary linguistic usage (*nach dem gewöhnlichen Sprachgebrauch*)". Ehrlich (1903, p. 27; 1917a, p. 70) was quite critical of "the administration of law preferring a literal interpretation (*wörtliche Auslegung*)". It "does not even have the advantage of consistency (*Beständigkeit*) in itself", he said. "The word is a highly imperfect tool of thought, and no one has yet succeeded in mastering things by means of words (*Das Wort ist ein höchst unvollkommenes Werkzeug des Gedankens, und es ist noch niemand gelungen mittels der Worte die Dinge zu beherrschen*)" (Ehrlich, 1903, p. 27; 1917a, p. 70). Moreover, as of 1 July 2013 the European Union has 24 official languages and there is an "obligation to consider" the different language versions of the written law (*das geschriebene Recht*) of the Union (Kutscher, 1976a, p. I-17):

[114] Theses on the methods of interpretation of Community law, from the point of view of a judge.

> "By accepting the apparently clear wording of one version as authentic the court disregards the fact that consideration of the versions in the other languages may perhaps cast doubt on the correctness of the result of the interpretation. Indeed the special feature of the interpretation of texts in several languages lies *inter alia* in the very fact that questions of interpretation arise only if the meaning and significance of the wording in the various languages appear to differ from each other, that is, if the ascertainment of the meaning of a prescription (*Vorschrift*) cannot just be based on one version or equally on the versions in all the languages".

"For the purposes of a literal interpretation" of a "provision" of Community law "it must be borne in mind that Community legislation is drafted in various languages and that the different language versions are all equally authentic", the Court of First Instance of the European Communities said in paragraph 42 of its judgement of 6 October 2005 in Joined Cases T-22/02 and T-23/02 Sumitomo Chemical Co. Ltd and Sumika Fine Chemicals Co Ltd v. Commission of the European Communities [2005] ECR II-4065[115]. When "the meaning of the various language versions appears to differ" the Court of Justice "determines the correct meaning of the provision by adopting other methods of interpretation" (Kutscher, 1976a, p. I-19).

A "peculiarity" of Union law that is "often overlooked" is that the Court of Justice of the European Union interprets the Treaty on European Union and the Treaty on the Functioning of the European Union as constitutions are interpreted, Dieter Grimm remarked during a lecture at the Central European University in Budapest on 26 March 2012 (Central European University, 2012). The Court of Justice of the European Union "constitutionalized", he said, the "international treaties" that are "the legal foundation of the European Union…". During this "constitutionalization" of the Treaties the Court of Justice "departed from literal interpretation in all its leading cases…"[116], Itzcovich (2009, p. 550) has argued. Kutscher (1976a, p. I-20;

[115] See also paragraph 95 of its judgement of 7 November 2005 in Case T-374/04 Federal Republic of Germany v. Commission of the European Communities [2007] ECR II-4431 and paragraph 67 of its judgement of 9 September 2008 in Joined Cases T-349/06, T-371/06, T-14/07, T-15/07 and Case T-332/07 Federal Republic of Germany v. Commission of the European Communities [2008] ECR II-2181.

[116] The examples given are Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend en Loos v. Nederlandse Administratie der Belastingen [1963] ECR 1, Case 6/64 Costa v. ENEL [1964] ECR 585, Case 29/69 Stauder v. City of Ulm [1969] ECR 419, Case 11/70 Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125, Case 41/74 van Duyn v. Home Office [1974] ECR 1337 and Case 120/78 Rewe-Zentral AG v. Bundesmonopolverwaltung für Branntwein [1979] ECR 649.

1976b, p. I-21) admitted that the Court of Justice "accords only limited importance (*nur geringe Bedeutung*) to literal interpretation...".

Historical interpretation can be either "subjective" historical interpretation or "objective historical interpretation" (Kutscher, 1976b, p. I-22). Subjective historical interpretation is "recourse to (*Rückgriff auf*) the true will of the historical legislature". Objective historical interpretation is "recourse to the 'objective' will of the legislature, thus in particular to the function of a norm at the point in time of its issue…". Kutscher clarified that, "as regards the *Treaties*, it would here be better to speak of the common will of the parties to the treaty (*gemeinsamen Willen der Vertragsparteien*)" than of the "true will of the historical legislature". "As a possible source of knowledge (*Erkenntnisquelle*) this 'common will' has previously though occasionally been cited by the Court of Justice", he said. In Case 6/60 Humblet v. Belgian State [1960] ECR 559, however, the Court of Justice, according to the French language version of the judgement, "noted that it is not possible to detect a common attitude (*attitude commune*; *comune atteggiamento*; *übereinstimmende Auffassung*) of the member states susceptible of serving as a criterion for interpreting Article 11(b)" of the Protocol on the privileges and immunities of the European Coal and Steel Community[117]. "Objective historical interpretation, which is geared above all to the purpose of the individual treaty norm at the point in time of the conclusion of the treaty, has – as far as I see – found no expression in the case-law of the Court of Justice", Kutscher (1976b, p. I-22) stated. Community law is "future-orientated" and "an interpretation fixed to the position of departure (*Ausgangslage*) would in no way be appropriate", he said (Kutscher, 1976b, p. I-22). "Seen as a whole therefore", he concluded, "the historical interpretation of Community law plays only a subordinate role…" (Kutscher, 1976b, p. I-23).

Kutscher (1976a, p. I-26) revealed that "within the Court [of Justice] a considerable amount of time and energy is devoted to comparative law…". "There is", he said, "complete agreement that when the Court interprets or supplements Community law on a comparative-law basis it is not obliged to take the minimum which the national solutions have in common, or their arithmetical mean (*arithmetisches Mittel*) or the solution produced by a majority of the legal systems as the basis of its decision" (Kutscher, 1976a, p. I-29; 1976b, p. I-30). The Court of Justice searches for "the 'best' and 'most suitable' (*zweckmäßigsten*) solution"; this will be, he said, "the one which meets the specific objectives and basic principles of the Community…in

[117] Article 11(b) of the Protocol on the privileges and immunities of the European Coal and Steel Community provided that in the territory of each of the member states of the European Coal and Steel Community and whatever their nationality "the members of the High Authority and officials of the Community" were "exempt from any tax on salaries or emoluments paid by the Community...".

the *most satisfactory* way" (Kutscher, 1976a, p. I-29; 1976b, p. I-30) (emphasis added). Advocate General Karl Roemer, in his opinion of 18 September 1973 in Joined Cases 63/72 to 69/72 Wilhelm Werhahn Hansamühle and others v. Council of the European Communities [1973] ECR 1229, stated:

> "What is important…is not the correspondence (*Übereinstimmung*) of the legal orders of all member states or a kind of voting with the assessment of a majority; rather, what is important is what renowned authors (such as Zweigert[118]) have called *evaluative* comparative law (wertende *Rechtsvergleichung*)"[119].

The "creat[ion]" of "fundamental rights protection" in the European Union "comparable" to the German *Grundgesetz* was "possible only by means of further developing the law (*rechtsfortbildend*) via the method of...evaluative comparative law (*wertende Rechtsvergleichung*)", the *Bundesverfassungsgericht* recalled in its decision of 6 July 2010 in 2 BvR 2661/06[120].

Systematic interpretation (*systematische Auslegung*) and teleological interpretation are "in the foreground in the interpretation of Community law by the Court of Justice…", Kutscher (1976b, p. I-31) confirmed. "Systematic and teleological interpretation of a norm are closely interlocked in the case-law of the Court...", he said (Kutscher, 1976a, p. I-40; 1976b, p. I-42). The systematic interpretation of a norm is the the interpretation of a norm in its "systematic context (*systematische Zusammenhang*)…" (Kutscher, 1976b, p. I-7). He argued that the use of systematic interpretation "corresponds to the special features which characterize the legal order (*Rechtsordnung*) of the Community" (Kutscher, 1976a, p. I-36; 1976b, p. I-38). This legal order, he said, "takes the form of a broadly conceived plan (*ein groß angelegter Plan*)"; systematic interpretation "sees the norms of Community law in their relationship with each other and with the scheme and the principles of the plan" and "cannot escape a certain systematization and therefore on occasion demands that the solution of a problem be inferred by

[118] Konrad Zweigert (22.1.1911 – 12.2.1996). See Zweigert (1964, p. 611).

[119] The official English translation of this opinion does not exactly correspond to the German original and has not been used.

[120] As examples of this the *Bundesverfassungsgericht* cited the judgements of the Court of Justice in Case 11/70 Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125 and Case 4/73 J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities [1974] ECR 491.

deduction from general legal principles (*allgemeinen Rechtsgrundsätzen*)". When Union norms are interpreted teleologically they are interpreted "in light of the objectives and purposes" of the Union (Kutscher, 1976b, p. I-7). Kutscher (1976a, p. I-39; 1976b, p. I-41 – I-42) asserted:

> "The principle of the progressive integration of the member states in order to attain the objectives of the Treaty [establishing the European Economic Community] does not only comprise a political requirement; it amounts rather to a Community legal principle (*Rechtsprinzip*), which the Court of Justice has to bear in mind when interpreting Community law, if it is to discharge in a proper manner its allotted task of upholding the law when it interprets and applies the Treaties".

It is "unmistakable", Kutscher (1976b, p. I-7) accepted, that in the case-law of the Court of Justice systematic and teleological interpretation "stand out strongly (*stark hervortreten*)" and "some methods" of interpretation "have only minor importance".

A "teleological" interpretation of a legal proposition is "an interpretation not according to the purposes for which the author [of the legal proposition] has striven, but according to those which to the interpreter appear worth striving for", Ehrlich (1917b, p. 14) wrote. Ehrlich (1917b, p. 31) believed that teleological interpretation gives "to the judge the right to frustrate the purposes of the author, to pursue under the cloak (*Deckmantel*) of interpretation of the legal proposition his own purposes and above all to paralyze the measures of the state in legal fields (*Rechtsgebiete*)". "For the administration of law (*Rechtspflege*) only historical interpretation is…authoritative, because the administration of law has the task of carrying out that which the author wanted to arrange (*anordnen*) in the legal proposition, and since only historical interpretation gives information about that which the author wanted to arrange", Ehrlich (1917b, p. 31-32) maintained.

The German *Bundesverfassungsgericht* discussed the concept of the further development of law by judges (*richterliche Rechtsfortbildung*) in its decision of 11 July 2012 in 1 BvR 3142/07[121]. "The application and interpretation of statutes (*Gesetze*) by the courts is consonant with the principle of the law-governed state (*Rechtsstaatsprinzip*)…if it moves within the limits of justifiable interpretation (*vertretbarer Auslegung*) and admissible further development of law by

121 http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2012/07/rs20120711_1bvr314207.html

judges (*zulässiger richterlicher Rechtsfortbildung*)", the *Bundesverfassungsgericht* held in paragraph 73. The further development of law by judges is "not law-positing (*Rechtsetzung*) with political creative freedom (*politischen Gestaltungsfreiräumen*)", the *Bundesverfassungsgericht* said in paragraph 64 of its decision of 6 July 2010 in 2 BvR 2661/06:

> "Further development of law...follows the instructions set out in statutes or international law. This is where it finds its foundations and its limits. There is particular reason for further development of law by judges where programmes are fleshed out, gaps are closed, evaluative contradictions (*Wertungswidersprüche*) are resolved or account is taken of the special circumstances of the individual case".

"Further development of law by judges (*richterliche Rechtsfortbildung*) must not lead to the courts substituting their own idea of material justice (*materielle Gerechtigkeitsvorstellung*) for that of the legislature", the *Bundesverfassungsgericht* said in paragraph 75 of its decision of 11 July 2012 in 1 BvR 3142/07: "A construction which, as further development of law by judges, puts aside (*hintanstellt*) the wording of the statute and flouts (*sich hinwegsetzt über*) the clearly-discernible will of the legislature inadmissibly encroaches on the competences of the democratically-legitimated legislature".

The "basic job" of the judge "is to apply the law", Gil Carlos Rodríguez Iglesias, the then President of the Court of Justice[122], said in August 2000 (Badinter & Breyer, 2004, p. 286). "Normally, a judge must apply written law, but the job also requires the application and elaboration of general legal principles", he added. The Court of Justice was modelled on the *Conseil d'Etat*[123] in France (Slynn, 1984, p. 427) and in a decision of 26 October 1945[124] the *Conseil d'Etat* referred to "general principles of law applicable even in the absence of a text (*principes généraux du droit applicables même en l'absence de texte*)" (Cummins, 1986, p. 603-604). "General principles of law represent important basic values…", Rodríguez Iglesias wrote in 2001 (p. 16). General legal principles have three functions in Union law (Lenaerts & Gutiérrez-Fons, 2010, p. 1629):

[122] Rodríguez Iglesias was a Judge of the Court of Justice of the European Communities from 31 January 1986 to 6 October 2003 and was President of the Court of Justice from 7 October 1994 to 6 October 2003.

[123] Council of State.

[124] *Aramu*, Recueil Lebon, p. 213.

> "Firstly, they enable the…Court of Justice to fill normative gaps left either by the authors of the Treaties or by the EU legislature. The 'gap-filling' function of general principles thus ensures the autonomy and coherence of the EU legal system. Secondly, general principles serve as an aid to interpretation, since both EU law and national law falling within the scope of EU law must be interpreted in light of the general principles. Finally, they may be relied upon as grounds for judicial review. EU legislation in breach of a general principle is to be held void and national law falling within the scope of EU law that contravenes a general principle must be set aside".

The Court of Justice "has developed general principles of Community law as a consequence of carrying out its duty under Article 220" of the Treaty establishing the European Community[125], Professor Ricardo Gosalbo Bono (2003, p. 133) of the Legal Service of the Council of the European Union told a symposium in Germany in 2002 on the judge-made law (*Richterrecht*) of the European Community.

The representatives of the free law movement were opposed to what Kantorowicz (1906, p. 14) described as "the dogma of the gaplessness (*Lückenlosigkeit*) of statutes…". The "logicial closedness"[126] of "positive law" had been an "essentially undisputed axiom" (Weber, 1922, p. 501). "Law is only the positive law (*Recht ist nur das positive Recht*)", Karl Bergbohm (18.9.1849 – 12.11.1927), for instance, had insisted (Bergbohm, 1892, p. 526). "The whole conception of legal gaps (*Rechtslücken*) should be abandoned once and for all", Bergbohm wrote in 1892 (p. 384-388):

> "A law (*Ein Recht*) …never requires filling from without (*Ausfüllung von außen her*), because it is at every moment complete, since its inner fruitfulness, its logical expansive force (*Expansionskraft*) in its own domain covers at every moment the whole of the requirements of legal judgements".

[125] "The Court of Justice…shall ensure that in the interpretation and application of this Treaty the law is observed" (OJ C 325, 24.12.2002, p. 122). See now Article 19 paragraph 1 sentence 2 of the Treaty on European Union (OJ C 83, 30.3.2010, p. 27).

[126] The phrase "logical closedness" was used by Erich Jung (1.7.1866 – 20.4.1950) in 1900.

The "current notion of positive law" is that "the statutes, codes or other written regulations" contain "necessarily and essentially, the comprehensive order, entire, sufficient for all human relations…", Gény (1900, p. 5-6) said in a speech at the University of Dijon on 8 November 1900 on *La notion de droit positif à la veille du XX^e siècle*[127]. Kantorowicz (1928, p. 701) contrasted the closedness theory (*Geschlossenheitstheorie*) – the theory that "the formal law"[128] is "a closed system free of gaps and contradictions" – with the gap theory (*Lückentheorie*), according to which one "must…regard formal law as subject to gaps". It "must be acknowledged", Kantorowicz said in a seminar in 1927, "that the formal law is subject to gaps…" (Kantorowicz, 1928, p. 701). Ehrlich (1903, p. 17; 1917a, p. 61) wrote in 1903 that "every system of fixed legal rules (*festgelegter Rechtsregeln*) is by its very nature incomplete…". Hans Kutscher, in contrast, argued on 27 September 1976 that "the concept 'gap' *presupposes* that one proceeds from a complete and closed legal order which in principle has regulated all conceivable cases and situations" (Kutscher, 1976b, p. I-10) (emphasis added). Jurists, Kantorowicz (1928, p. 699) wrote, are "always faced with 'gaps' in the law". He "distinguish[ed] between material and textual gaps" (Kantorowicz, 1928, p. 701-702). There is a "material" gap in the formal law if the legal rule "itself is lacking". There is a "textual" gap if "there is lacking only an adequate textual expression" of the "purpose" of the legal rule.

The "arbitrariness" of *Begriffsjurisprudenz* in relation to gaps in formal law "suffices for its rejection", Kantorowicz (1928, p. 705-706) asserted. The "schematical…type" of *Begriffsjurisprudenz* will "apply one alone out of several equally possible interpretations as the only one able to fill up the gap". The "pseudo-systematical…type" of *Begriffsjurisprudenz* will "fill the gap in pretended accordance with the whole system, but without regard to the peculiarity of the problem or case in question". The "*grenzverwirrende*[129] type" of *Begriffsjurisprudenz* involves "an unsuitable transference of a concept from a technically well-developed branch to a less developed one"; in a seminar in 1927 Kantorowicz (1928, p. 706) "illustrate[d]" this type of *Begriffsjurisprudenz* by referring to the eighteenth century Prussian case of the miller Christian Arnold[130].

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[127] The notion of positive law on the eve of the twentieth century.

[128] See the section on Kantorowicz in chapter 5.

[129] Boundary-confusing.

[130] Presumably the judgement of 28 October 1779 of the Neumark *Regierung* and the judgement of 8 December 1779 of the *Kammergericht* in Berlin. For details of these and the facts of the case see in particular the section on *Der Prozeß des Müllers Arnold unter Friedrich dem Großen* in Rudolf Stammler's *Praktikum des bürgerlichen Rechtes* (1903, p. 113-124) and *Friedrich der Große und die Prozesse des Müllers Arnold* (1891) by Karl Dickel. The "miller Arnold case" is also discussed by Thomas Carlyle in his *History of Friedrich II of Prussia* (1865, p. 276-303).

Ernst Zitelmann (7.8.1852 – 28.11.1923) cannot be "classed among the incontestable partisans" of the free law movement but his study of gaps in positive law[131] "played, in the development of the ideas of this movement...a major role (*un rôle si capital*)…", Gény (1919b, p. 358) wrote in the second edition of his book *Méthode d'interprétation et sources en droit privé positif*. In a rectorial address given at the University of Bonn on 18 October 1902 and published in 1903 Zitelmann (1903, p. 5) said that there are in the German Civil Code, "as in every other, gaps (*Lücken*)…in the sense…that the positive law (*das positive Recht*) affords (*gewähre*) no decision for a submitted case, that the answer to a particular question cannot be taken from it". "I want", he said, "to speak only of the cases where the statute within the tasks that it has set itself leaves gaps…"; he described these as gaps "within" the positive law (Zitelmann, 1903, p. 9). There are, according to Zitelmann (1903, p. 34), "two very different kinds" of gaps "within" the positive law: spurious gaps and genuine gaps (*echte Lücken*). Gény (1919b, p. 359-360) summarized Zitelmann's "reasoning…relative to what he considered false gaps (*unechte Lücken*)" in positive law:

> "…the author distinguishes two possible types of gaps…only one of which actually appears to him to merit the name. Sometimes, indeed, the statute having provided for such and such hypotheses for attaching such and such legal solutions, a new hypothesis is presented, which categorically does not fit into the legally-fixed framework.
>
> …
>
> But since, according to Zitelmann, the specific decision of the statute implies another more general decision, which would seem to apply outside of the conditions laid down in the text, there is no real gap here, and the interpreter asks only if it is founded (*fonde*) to correct the statute, by extending its specific solution outside the case exactly regulated, which can be admitted depending on the circumstances".

This is not "gap-filling (*Lückenausfüllung*)" but "making corrections", Zitelmann (1903, p. 34) said. In such cases "an exception is invariably made to some existing general rule…and this exception is based on that which one considers the purpose of the general rule…" (Zitelmann, 1903, p. 23, quoted in Berolzheimer, 1917, p. 173). Gény was unpersuaded. "Even if one accepts", he wrote, "the idea of decisions implicit in the statute, which do not always follow

[131] *Lücken im Recht* (1903).

from its categorical solutions, one has still to know how the case to be decided is related to one or the other" (Gény, 1919b, p. 360). Ehrlich (1917c, p. 339) criticized as "incorrect" the "perception that gaps are caused by the lack (*Mangel*) of a suitable legal proposition": "Zitelmann's 'spurious gaps' (*'unechte Lücken'*) are either genuine gaps or no gaps". Ehrlich defined a gap in the posited law as "the absence (*Fehlen*) of a legal proposition (*Rechtssatz*), where it would be necessary". "It may be emphatically emphasized that it concerns the absence of a legal proposition, not for example a suitable (*passenden*) legal proposition", he explained. "If a legal proposition (*Rechtssatz*) exists, then it must be applied; it may suit or not".

Zitelmann (1903, p.27) defined "genuine gaps (*echte Lücken*)" as "actual gaps in the sense that the statute responsible for an answer does not enable a decision at all but a decision must however be made":

> "The case of the real gap (*wahren Lücke*) is this: the statute provides a positive proposition, according to which to decide, but leaves undetermined within this proposition an individual element (*Moment*); in other words: the intention (*Wille*) of the statute that a certain type of legal treatment occur is clear, but within this framework (*Rahmen*) there are several possibilities and the statute does not say which of them it wants".

"In practice, general clauses [*Generalklauseln*] have been used by courts to find and fill gaps as well as to correct the law", Baudenbacher (1999, p. 347) acknowledged. Using its "so-called general clauses" German judges have "modified, amplified and even revolutionized" the German Civil Code (Markesinis, Unberath & Johnston, 2006, p. 121). Jutta Limbach, a former President of the *Bundesverfassungsgericht* said on 10 June 1999 at a conference on the German *Grundgesetz* that both general clauses and concepts that are undefined "delegate actual norm-making to the judge". They "allow for" more than "one correct decision", she contended (Limbach, 1999, p. 23).

Section 138 paragraph 1 of the German Civil Code[132], Section 826 of the German Civil Code[133], Section 1 of the German *Gesetz gegen den unlauteren Wettbewerb*[134] of 7 June 1909[135] (RGBl. 499), Section 242 of the German Civil Code[136] and Section 157 of the German Civil Code[137] are examples of general clauses. The first three refer to the concept of good morals (*gute Sitten*). The "rules of good morals (*règles bonnes mœurs*)" were defined by the Croatian jurist Valtazar Bogišić (7.12.1834 – 24.4.1908) in Article 785 of the General Property Code for the Principality of Montenegro (1888) as "those rules of good faith and honesty the observance of which the authorities cannot always strictly compel but the violation of which is always condemned by public sentiment"[138] (Dareste & Rivière, 1892, p. 213-214). "The benchmark (*Maßstab*) for the concept of 'good morals' (*'guten Sitten'*) (cf. § 138 Civil Code) the judge has to take from (*zu entnehmen*) the dominant popular consciousness (*aus dem herrschenden Volksbewußtsein*), 'the sense of propriety of all fair- and just-thinking' (*'dem Anstandsgefühl aller billig und gerecht Denkenden'*)", the German *Reichsgericht* said in its decision of 11 April 1901 in RGZ 48, 114, 124. In Section 242 and Section 157 of the German Civil Code the concept of faith and belief (*Treu und Glauben*) – comparable to *bona fides* – is employed[139]. "What faith and belief [*Treu und Glauben*] demand can never be predetermined by general rules", Rudolph Sohm (29.10.1841 - 16.5.1917) wrote in an article on the German Civil Code that was published three months before it entered into force (Sohm, 1899, p. 168):

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[132] "A legal transaction that offends against good morals (*guten Sitten*) is null" (Riesebieter, 1907, p. 39; Bundesministerium der Justiz, 2010, p. 24).

[133] "Anyone who in a manner offending against good morals (*guten Sitten*) intentionally causes harm to another is obliged to compensate the other for the harm caused" (Riesebieter, 1907, p. 253; Bundesministerium der Justiz, 2010, p. 115).

[134] Statute against unfair competition. For English translations see Davies (1916, p. 806-812) and Wolfe (1915, p. 64). The *Gesetz gegen den unlauteren Wettbewerb* of 7 June 1909 was "replaced" in 2004 (Stuyck, 2011, p. 124).

[135] "Anyone who in commercial intercourse for the purposes of competition undertakes actions which offend against good morals (*guten Sitten*) may be subject to a claim for an injunction and damages".

[136] "The obligor (*Schuldner*) is obliged to effect performance as faith and belief (*Treu und Glauben*) with regard to commercial conventions (*Verkehrssitte*) require" (Riesebieter, 1907, p. 74; Bundesministerium der Justiz, 2010, p. 34).

[137] "Contracts are to be interpreted as faith and belief (*Treu und Glauben*) with regard to commercial conventions (*Verkehrssitte*) require" (Riesebieter, 1907, p. 48; Bundesministerium der Justiz, 2010, p. 26).

[138] « *On entend, dans le présent Code, par règles bonnes mœurs (ces règles de bonne foi et d'honnêteté courante à l'observation desquelles l'autorité ne peut pas toujours strictement contraindre, mais dont la violation est toujours condamnée par le sentiment public* ».

[139] This phrase is found "in a number of medieval sources and…was used, in the context of commercial relations, as a synonym for *bona fides*" (Whittaker & Zimmermann, 2000, p. 18).

> "Faith and belief [*Treu und Glauben*]…demand justice, in the concrete sense, to be administered according to all the circumstances which, at a given time, bear upon any particular case".

Article 3 paragraph 1 of Directive 93/13/EEC of 5 April 1993 on unfair terms in consumer contracts (OJ L 95, 21.4.1993, p. 29) is an example of a general clause in Union law. It provides:

> "A contractual term which has not been individually negotiated[140] shall be regarded as unfair if, *contrary to the requirement of good faith*[141], it causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the consumer" (emphasis added).

The translations of the expression "contrary to the requirements of good faith" in the various language versions "differ, and in some cases are diametrically opposed"[142], the European Economic and Social Committee stated in its opinion of 30 November 2000 (OJ C 116, 20.4.2001, p. 117) on a Commission report on the implementation of Directive 93/13/EEC. "The whole concept of 'good faith' is ambiguous…"[143]. "It is also not clear what constitutes the 'significant imbalance' that is mentioned as a further requirement, above and beyond the requisite 'good faith' ", the Committee complained.

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[140] See Article 3 paragraph 2.

[141] *Treu und Glauben* in the German language version. *Bonne foi* in the French language version.

[142] In the other languages versions the phrase "contrary to the requirement of good faith" is translated as въпреки изискването за добросъвестност (Bulgarian), *pese a las exigencias de la buena fe* (Spanish), *jestliže v rozporu s požadavkem přiměřenosti* (Czech), *til trods for kravene om god tro* (Danish), *entgegen dem Gebot von Treu und Glauben* (German), *vastuolus heausksuse tingimusega ning* (Estonian), παρά την απαίτηση καλής πίστης (Greek), *en dépit de l'exigence de bonne foi* (French), *u suprotnosti s uvjetom o dobroj vjeri* (Croatian), *malgrado il requisito della buona fede* (Italian), *pretēji prasībai pēc godprātības* (Latvian), *pažeidžiant sąžiningumo reikalavimą dėl* (Lithuanian), *ha a jóhiszeműség követelményével ellentétben* (Hungarian), *kontra l-ħtieġa ta' buona fede* (Maltese), *in strijd met de goede trouw* (Dutch), *stoją w sprzeczności z wymogami dobrej wiary* (Polish), *a despeito da exigência de boa fé* (Portuguese), *în contradicție cu cerința de bună credință* (Romanian), *ak napriek požiadavke dôvery* (Slovak), *nasprotju z zahtevo dobre vere* (Slovenian), *hyvän tavan vastaisesti* (Finnish) and *strid med kravet på god sed* (Swedish).

[143] The Committee quoted the Portuguese jurist Fernando Pinto Monteiro: "What, in the final analysis, does 'contrary to the requirement of good faith' mean? Is good faith to be understood subjectively or objectively? And if it is objective, can the term be unfair (because it creates 'a significant imbalance…to the detriment of the consumer') and still be in good faith?".

The Court of Justice said in paragraph 66 its judgement of 14 March 2013 in Case C-415/11 Aziz v. Caixa d'Estalvis de Catalunya, Tarragona i Manresa (Catalunyacaixa) [2013] ECR I-0000 that "*according to settled case-law*, the relevant jurisdiction of the Court extends to the interpretation of the concept of 'unfair term' used in Article 3 paragraph 1 of the directive...and to the criteria which the national court may or must apply when examining a contractual term in the light of the provisions of the directive, bearing in mind that it is for *that court* to determine, in the light of those criteria, whether a particular contractual term is actually unfair in the circumstances of the case" (emphasis added). In paragraphs 68 and 69 the Court held:

> "...in order to ascertain whether a term causes a 'significant imbalance' in the parties' rights and obligations arising under the contract, to the detriment of the consumer, it must in particular be considered what rules of national law would apply in the absence of an agreement by the parties in that regard. Such a comparative analysis will enable *the national court* to evaluate whether and, as the case may be, to what extent, the contract places the consumer in a legal situation less favourable than that provided for by the national law in force. To that end, an assessment should also be carried out of the legal situation of that consumer having regard to the means at his disposal, under national legislation, to prevent continued use of unfair terms.
>
> With regard to the question of the circumstances in which such an imbalance arises 'contrary to the requirement of good faith'…*the national court* must assess for those purposes whether the seller or supplier, dealing fairly and equitably with the consumer, could reasonably assume that the consumer would have agreed to such a term in individual contract negotiations". (Emphasis added.)

In its judgement of 18 October 2011 in Case C-34/10 Brüstle v. Greenpeace e.V. [2011] ECR I-9821 the Grand Chamber of the Court of Justice defined the concept of "human embryo". The Grand Chamber held in paragraph 26 that because the text of Directive 98/44/EC of 6 July 1998 on the legal protection of biotechnological inventions "does not define human embryo" or "contain any reference to national laws as regards the meaning to be applied to those terms" it "therefore follows that it must be regarded, for the purposes of application of the Directive, as designating an autonomous concept of European Union law (*autonomer Begriff des Unionsrechts*) which must be interpreted in a uniform manner throughout the territory of the Union". "It must be borne in mind," the Grand Chamber said, that "the meaning and scope of

terms" for which Union law "provides no definition must be determined by considering, *inter alia*, the context in which they occur and the purposes of the rules of which they form part…". The Grand Chamber cited, "to that effect, *inter alia*, Case C-336/03 easyCar [2005] ECR I-1947, paragraph 21; Case C-549/07 Wallentin-Hermann [2008] ECR I-11061, paragraph 17; and Case C-151/09 UGT-FSP [2010] ECR I-0000, paragraph 39". The concept of "human embryro" was then defined by the Grand Chamber in paragraphs 35 and 36.

"The need for uniform application of Community law and the principle of equality require that the terms of a provision of Community law which makes no express reference to the law of the member states for the purpose of determining its meaning and scope must normally be given an autonomous and uniform interpretation throughout the Community; that interpretation must take into account the context of the provision and the purpose of the legislation in question", the Court of Justice held in paragraph 43 of its judgement of 19 September 2000 in Case C-287/98 Grand Duchy of Luxemburg v. Berthe Linster, Aloyse Linster and Yvonne Linster [2000] ECR I-6917[144].

Not only general clauses are open to interpretation. Advocate General Christine Stix-Hackl quoted at footnote 16 of her opinion of 26 September 2002 in Case C-195/99 P Krupp Hoesch Stahl AG v. Commission of the European Communities [2003] ECR I-10937 paragraph 36 of the judgement of 22 November 1995 of the European Court of Human Rights in S.W. v. the United Kingdom (1996) 21 EHRR 363:

> "However clearly-drafted a legal provision may be, in any system of law, including criminal law, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances".

[144] The Court of Justice cited paragraph 11 of its judgement of 18 January 1984 in Case 327/82 Ekro BV Vee- en Vleeshandel v. Produktschap voor Vee en Vlees [1984] ECR 107.

The European Court of Human Rights held that Article 7 of the Convention for the Protection of Human Rights and Fundamental Freedoms[145] "cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence (*infraction*) and could reasonably be foreseen"[146].

"As a general rule, neither criminal law nor the rules of criminal procedure" fell "within the...competence" of the European Community, the Grand Chamber of the Court of Justice noted in paragraph 47 of its judgement of 13 September 2005 in Case C-176/03 Commission of the European Communities v. Council of the European Union [2005] ECR I-7879. "However," the Grand Chamber held in paragraph 48, this did not prevent (*empêcher*) the Community legislature taking measures relating to (*en relation avec*) the criminal law of the member states "and that it deems necessary to ensure the full effectiveness of the norms that it enacts…[147] (*et qu'il estime nécessaires pour garantir la pleine effectivité des normes qu'il édicte*…)".

The Court of Justice, in its judgement of 27 March 2014 in Case C‑565/12 LCL Le Crédit Lyonnais SA v. Kalhan, said that the "the question arises" of whether or not the "severity" of a "penalty" under French national law for an infringement of "a provision intended to transpose Article 8" of Directive 2008/48/EC of 23 April 2008 on credit agreements for consumers "is commensurate with the seriousness of the infringements for which it is imposed and, in particular, whether such a penalty has a genuinely dissuasive effect". The Court said, in paragraph 44, that it "has consistently held, with regard to" the principle of loyal cooperation (*coopération loyale*), "now enshrined in Article 4(3)" of the Treaty on European Union, "that, while the choice of penalties remains within their discretion, member states must ensure in particular that infringements of EU law are penalised under conditions, both procedural and substantive, which are analogous to those applicable to infringements of national law of a similar nature and importance and which, in any event, make the penalty effective, proportionate and dissuasive"[148]. "In particular," the Court said, it "has held that the severity of

[145] Article 7 of the Convention prohibits the punishment of acts that did not at the time of their commission constitute criminal acts. Article 7 also prohibits the imposition of a heavier punishment than that which was applicable at the time the criminal act was committed.

[146] In the French text, "…and is reasonably foreseeable".

[147] The French language version is quoted. (French was the procedural language.)

[148] The Court of Justice cited "*inter alia*," paragraphs 64 and 65 of its judgement of 3 May 2005 in Joined Cases C‑387/02, C‑391/02 and C‑403/02 Criminal proceedings against Silvio Berlusconi and others [2005] ECR I‑3565 and paragraph 50 of its judgement of 26 September 2013 in Case C-418/11 Texdata Software GmbH [2013] ECR I-0000.

penalties must be commensurate with the seriousness of the infringements for which they are imposed, in particular by ensuring a genuinely dissuasive effect, while respecting the general principle of proportionality"[149]. The Court of Justice said in paragraph 50 that the national courts "alone" have "jurisdiction to interpret and apply national law" and therefore competence to "assess" whether or not a "penalty" under national law for an infringement of Union law is "effective, proportionate and dissuasive".

"The range for supplementary law-making by the courts depends on the legislation involved", Hein Schermers (27.9.1928 – 31.8.2006) wrote in an article published in 1974. He stated that "the more general the legislation, the more room the courts have for making supplementary rules through interpretation" (Schermers, 1974, p. 453). The "legislative role" of the Court of Justice was "relatively important", he said, because the legislation of the then European Economic Community was "broad and incomplete". In 1999 Baudenbacher (1999, p. 357) observed that the Treaty establishing the European Community contained "a large number" of general clauses.

Koen Lenaerts (2007, p. 1017), a Judge of the Court of Justice since 7 October 2003 and Vice-President of the Court of Justice since 9 October 2012, has written that "the nature of the EC Treaty as a *traité-cadre* means that the Treaty was drafted in general terms and designed to be incomplete and imprecise, leaving open various lacunae for the Court of Justice and the other European institutions to fill". Frame-treaty is the most literal translation of *traité-cadre* (Atkins, Duval & Milne, 1987, p. 92). "All the way through the Treaty [establishing the European Economic Community] there are gaps"[150], Lord Denning, the then Master of the Rolls in England, commented in HP Bulmer Ltd v. J Bollinger SA [1974] Ch 401: "It lays down general principles. It expresses its aims and purposes…[b]ut it lacks precision. It uses words and phrases without defining what they mean". The "gaps" in the Treaty "have to be filled in by the judges or by regulations and directives", Lord Denning stated. The regulations and directives themselves "give only an outline plan", however: "The details are to be filled in by the judges". The Treaty establishing the European Economic Community was a *traité-cadre*, Advocate General Walter van Gerven reminded the Court of Justice in paragraph 26 of his opinion of 27 October 1993 in Case C-128/92 H.J. Banks & Co. Limited v. British Coal Corporation [1994] ECR I-1212. The Treaty on European Union and the Treaty on the Functioning of the European

[149] The Court cited "paragraph 51" of its judgement of 26 September 2013 in Case C-418/11 Texdata Software GmbH [2013] ECR I-0000.

[150] For example, the Treaty establishing the European Economic Community "did not define the relationship between Community law and national law" (Ehlermann, 1984, p. 321).

Union are also *traités-cadre* and the "legislative acts"[151] of the Union are often as "incomplete and imprecise" as the *traités-cadre*. The gaps in these *traités-cadre* and this *législation-cadre* are filled by the Court of Justice of the European Union.

Courts do more than simply interpret legal propositions or "further develop" law. Courts interpret, further develop and create law: "the production of law (*Rechtserzeugung*)" is a "task" judges and the legislative organs "share", Hans Kutscher (1976b, p. I-49), a Judge and later President of the Court of Justice of the European Communitites – and a former Judge of the German *Bundesverfassungsgericht* – said at a conference in Luxembourg in September 1976. Chapter 4 illustrates the production of law of the Court of Justice.

[151] See Article 289 paragraph 3 of the Treaty on the Functioning of the European Union (OJ C 83, 30.3.2010, p. 172).

Chapter 4

"Whatever debate there may be in some countries about the legitimacy and scope of the judges' role as law-makers, it is surely incontestable that the Court of Justice has been obliged to assume that role", Lord Bingham, a senior British judge[152], said at a symposium in Luxembourg on 26 March 2007 (Bingham, 2007, p. 14). The opinion of Carl Baudenbacher, President of the Court of Justice of the European Free Trade Association, that the "constitutional principles" of precedence, direct effect and state liability were "developed" by the Court of Justice of the European Union "itself" and that they were developed…based on a free law attitude" was quoted in the introductory chapter. The "recognition" of these "constitutional principles…created" a "monist[153] system", according to Baudenbacher (2005, p. 413). The establishment of four "constitutional principles" of Union law by the Court of Justice is described in this chapter. Those principles are the principle of the precedence (*Vorrang*) of Union law, the principle of direct effect *(unmittelbare Wirkung*), the principle of state liability (*Staatshaftung*) and the principle of the protection of fundamental rights (*Grundrechtsschutz*).

The principle of the precedence (Vorrang) of Union law

The principle (*Grundsatz*) of the precedence (*Vorrang*)[154] of Union law was established (*festgestellt*) by the Court in its judgement of 15 July 1964 in Case 6/64 Costa v. ENEL [1964] ECR 585 and precised (*präzisiert*) in the judgement of 9 March 1978 in Case 106/77 Amministrazione delle Finanze dello Stato v. Simmenthal SpA [1978] ECR 629, the Court of Justice stated in paragraph 17 of its judgement of 21 May 1987 in Case 249/85 Albako Margarinefabrik Maria von der Linde GmbH & Co. KG v. Bundesanstalt für landwirtschaftliche Marktordnung [1987] ECR 2345.

[152] He was the then Senior Lord of Appeal in Ordinary in the House of Lords.

[153] "A theory or doctrine which states that there is a single origin or destination for all the elements or beings within a system, or that there is a single force by which such elements are governed" is the definition of monism, in that sense, in the *Oxford English Dictionary*: http://www.oed.com/view/Entry/121244

[154] The term *Vorrang* is used consistently in the German language versions of the judgements of the Court of Justice and the opinions of the Advocates General but in the English language versions this principle is variously expressed as precedence, supremacy or primacy.

The Court of Justice held, in its judgement of 15 July 1964 in Case 6/64 Costa v. ENEL [1964] ECR 585, at page 593, that the member states of the European Economic Community had "limited their sovereign rights, albeit within limited fields, and…created a body of law (*Rechtskörper*) which binds both their nationals and themselves". The Court of Justice held, at page 594, that "the law stemming from the Treaty, an independent source of law[155] could not, because of its special and original nature, be overridden by domestic legal provisions, however framed, without being deprived of its character as Community law and without the legal basis (*Rechtsgrundlage*) of the Community itself being called into question".

In its judgement of 9 March 1978 in Case 106/77 Amministrazione delle Finanze dello Stato v. Simmenthal SpA [1978] ECR 629 the Court of Justice held in paragraph 17 that "in accordance with the principle of the precedence (*Vorrang*) of Community law, the relationship between provisions of the Treaty and directly applicable legal acts (*unmittelbar geltenden Rechtsakte*) of the institutions on the one hand and the national law of the member states on the other is such that those provisions and legal acts (*Bestimmungen und Rechtsakte*) not only by their entry into force render automatically inapplicable any conflicting provision of current national law but – in so far as they are an integral part of, and take precedence in, the legal order applicable in the territory of each of the member states – also preclude the valid adoption of new national legislative acts (*neuer staatlicher Gesetzgebungsakte*) to the extent to which they would be incompatible with Community norms (*Gemeinschaftsnormen*)".

The Court of Justice stated in paragraph 18 that "any recognition that national legislative acts (*Gesetzgebungsakten*; *atti legislativi nazionali*) which encroach upon the field within which the Community exercises its legislative power (*potere legislativo*) or which are otherwise incompatible with the provisions of Community law had any legal effectiveness (*rechtliche Wirksamkeit*; *efficacia giuridica*) would amount to a corresponding denial of the effectiveness of obligations undertaken unconditionally and irrevocably by member states pursuant to the Treaty and would thus imperil the very foundations (*basi*) of the Community". It held in paragraph 21 that "every national court must, in a case within its jurisdiction, apply Community law in its entirety and protect rights which the latter confers on individuals and must accordingly disapply[156] (*unangewendet*; *disapplicando*) any provision of national law which may conflict with it, whether prior or subsequent to the Community norm (*Gemeinschaftsnorm*)". National courts "must protect rights conferred by provisions of the

[155] In the German language version, "an autonomous source of law (*einer autonomen Rechtsquelle*)...".

[156] In the English language version, "…set aside…".

Community legal order and...it is not necessary for such courts to request or await the actual removal[157] (*Beseitigung*; *rimozione*) by the national organs competent for that purpose (*organi nazionali all'uopo competenti*) of any national measures which might impede the direct and immediate application of Community norms (*Gemeinschaftsnormen*)", the Court of Justice concluded in paragraph 26 of its judgement.

In its judgement of 8 December 2010 in Case C-409/06 Winner Wetten GmbH v. Bürgermeisterin der Stadt Bergheim [2010] ECR I-8015, the Grand Chamber of the Court of Justice "recalled" in paragraph 53 "that, according to settled case-law (*nach ständiger Rechtsprechung*), in accordance with the principle of the precedence of Union law, provisions of the Treaty and directly applicable measures of the institutions have the effect, in their relations with the internal law of the member states, merely by entering into force, of rendering automatically inapplicable any conflicting provision of national law". The Court of Justice said in paragraph 54 that it "has emphasized" that "directly applicable provisions of Union law (*unmittelbar geltenden Bestimmungen des Unionsrechts*) which are an immediate source of rights and obligations for all concerned, whether member states or individuals who are parties to legal relationships (*Rechtsverhältnissen*) under Union law, must deploy their full effects, in a uniform manner in all member states, as from their entry into force and throughout the duration of their validity"[158]. "According to settled case-law[159] (*Nach ständiger Rechtsprechung*), any national court, hearing a case within its jurisdiction, has, as an organ of a member state, the obligation pursuant to the principle of cooperation set out in Article 10 EC[160], fully to apply the directly applicable law of the Union and to protect the rights which the latter confers upon individuals, disapplying any provision of national law which may be to the contrary, whether the latter is prior to or subsequent to the Union norm (*Unionsnorm*)", the Court of Justice stated in paragraph 55. "It follows", the Court of Justice held in paragraph 56, "that any provision of a national legal system and any legislative, administrative or judicial practice which might impair the effectiveness of Union law by withholding from the national court having jurisdiction to apply such law the power to do everything necessary at the moment of its application to set

[157] In the English language version, "…setting aside…".

[158] „*Wie der Gerichtshof hervorgehoben hat, müssen nämlich die unmittelbar geltenden Bestimmungen des Unionsrechts, die für alle von ihnen Betroffenen eine unmittelbare Quelle von Rechten und Pflichten sind, einerlei, ob es sich um die Mitgliedstaaten oder um solche Einzelnen handelt, die an dem Unionsrecht unterliegenden Rechtsverhältnissen beteiligt sind, ihre volle Wirkung einheitlich in sämtlichen Mitgliedstaaten vom Zeitpunkt ihres Inkrafttretens an und während der gesamten Dauer ihrer Gültigkeit entfalten*".

[159] In the English language version, "It is also settled case-law…".

[160] Article 10 of the Treaty establishing the European Community (OJ C 321E, 29.12.2006, p. 47).

aside national legislative provisions which might prevent directly applicable norms of Union law (*Normen des Unionsrechts*) from having full force and effect are incompatible with the requirements which are the very essence of Union law". The Court of Justice "noted" in paragraph 58 of its judgement "that, according to settled case-law (*nach ständiger Rechtsprechung*), the principle of effective judicial protection (*Grundsatz des effektiven gerichtlichen Rechtsschutz*) is a general principle of Union law stemming from the constitutional traditions common to the member states, which has been enshrined in Articles 6 and 13 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, signed in Rome on 4 November 1950, and which has also been reaffirmed by Article 47 of the Charter of Fundamental Rights of the European Union, and that, under the principle of cooperation laid down in Article 10 EC, it is for the member states to ensure judicial protection of an individual's rights under Union law". The Court finally declared in paragraph 61: "Prescriptions of national law (*Vorschriften des nationalen Rechts*), even if they have constitutional status (*auch wenn sie Verfassungsrang haben*)[161], cannot be allowed to impair (*beeinträchtigen*)[162] the uniform validity (*einheitliche Geltung*)[163] and effectiveness of Union law".

One of the declarations annexed to the Final Act of the Intergovernmental Conference that adopted the Treaty of Lisbon of 13 December 2007 is the "Declaration on precedence (*Erklärung zum Vorrang*)" (ABl. C 83 vom 30.3.2010, S. 344) or, in the English language version, the "Declaration concerning primacy" (OJ C 83, 30.3.2010, p. 344)[164]. "The Conference recalls", the English language version of the Declaration states, "that, in accordance with well-settled case-law (*ständigen Rechtsprechung*) of the Court of Justice of the European Union, the Treaties and the law adopted by the Union on the basis of the Treaties have primacy (*Vorrang*; *priment*) over the law of member states, under the conditions laid down by the said case-law". The Conference "decided to attach as an Annex to this Final Act the Opinion [of 22 June 2007] of the Council Legal Service[165] on the primacy (*Vorrang*) of EC law as set out in 11197/07 (JUR 260)":

[161] In the English language version, "…even of a constitutional order…".

[162] In the English language version, "…undermine…".

[163] In the English language version, "…unity…".

[164] In the French language version, "Declaration relating to primacy (*Déclaration relative à la primauté*)" (JO C 83, 30.3.2010, p. 344).

[165] The Legal Service of the Council of the European Union.

> "It results from the case-law of the Court of Justice that primacy[166] of EC law is a cornerstone principle[167] of Community law. According to the Court, this principle is inherent to the specific nature[168] of the European Community. At the time of the first judgment of this established case-law (Costa/ENEL, 15 July 1964, Case 6/64 [i.e., the judgement of 15 July 1964 of the Court of Justice in Case 6/64 Costa v. ENEL [1964] ECR 585]) there was no mention of primacy in the treaty. It is still the case today. The fact that the principle of primacy will not be included in the future treaty shall not in any way change the existence of the principle and the existing case-law of the Court of Justice".

The Constitutional Treaty of 29 October 2004[169] included an article (Article I-6) on the precedence (*Vorrang*) of Union law: "The Constitution and law adopted by the institutions of the Union in exercising competences conferred on it shall have primacy[170] over the law of the member states" (OJ C 310, 16.12.2004, p. 12). Lucia Rossi, professor of European Union law at the University of Bologna, wrote in 2008 that "the evolution from the Constitutional Treaty to the Lisbon Treaty" had "confirmed" that the principle of the "primacy" of Community law – which was in 2008 an "over 40-year-old principle" – was "a well-known public secret which apparently is best not written into the European Treaties" (Rossi, 2008, p. 65): "Thus, the principle of primacy remains a judge-made rule…". "The primacy of Union law is a fundamental principle of that law…", the President of the European Commission, in an answer given on behalf of the Commission, told the European Parliament on 9 June 2008[171].

That Union law has "absolute" precedence is, according to de Witte (2011, p. 352), "generally not accepted by national constitutional and supreme courts".

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[166] In the German language version, "…the precedence (*der Vorrang*)…". In the French language version, "…the primacy (*la primauté*)…".

[167] In the French language version, "…a fundamental principle…".

[168] In the French language version, "…the particular nature…".

[169] Not ratified.

[170] In the German text, "…precedence (*Vorrang*)…" (ABl. C 310 vom 16.12.2004, S. 12).

[171] http://www.europarl.europa.eu/sides/getAllAnswers.do?reference=E-2008-1151&language=EN

"Unlike the precedence of validity (*Geltungsvorrang*) of federal law in a federal state the precedence of application (*Anwendungsvorrang*) of Union law, which is based on a national instruction as to the application of law (*auf einem nationalen Rechtsanwendungsbefehl beruhende*), cannot be comprehensive", the German *Bundesverfassungsgericht* said in paragraph 26 of its decision of 14 January 2014 in 2 BvR 2728/13[172]. The constititional courts and supreme courts in the member states have shown "different degrees of deference" to the principle of the precedence of Union law (Woods & Watson, 2012, p. 96) and most of those courts view national law as the "source" of the precedence of Union law (de Witte, 2011, p. 356). "Everywhere," de Witte (2011, p. 356) found, "the national constitution remains at the apex of the hierarchy of legal norms, and EU law is allowed to trump national law only under the conditions, and within the limits, set by the national constitution". The Spanish Constitutional Tribunal (*Tribunal Constitucional*), for example, said in Declaration 1/2004 of 13 December 2004[173] that the supremacy (*supremacía*) of the Spanish Constitition is "compatible with application regimes that give applicative preference to norms of a system other than the national system as long as the Constitution itself has so provided, which is exactly what occurs with the provision contained in its Article 93, by which is possible the cession (*cesión*) of competences derived from the Constitution in favour of an international institution thus constitutionally empowered…". "In sum," the Constitutional Tribunal said, the Spanish Constitution "has accepted, in virtue of its Article 93, the primacy (*primacía*) of Union law in the ambit (*ámbito*) that is proper to that law…".

The positions of the national courts on the principle of the precedence of Union law are not examined in this thesis, however, because their positions are conclusions based on interpretations of national law.

172 http://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/DE/2014/01/rs20140114_2bvr272813.html

173 http://hj.tribunalconstitucional.es/HJ/es/Resolucion/Show/6945

The principle of direct effect (unmittelbare[174] Wirkung)

"Independently of the legislation of member states, Community law…is…intended…to confer upon…individuals…rights" and these rights "arise not only where they are expressly granted by the Treaty [establishing the European Economic Community], but also by reason of obligations which the Treaty imposes in a clearly defined way upon individuals as well as upon the member states and upon the institutions of the Community", the Court of Justice held in its judgement of 5 February 1963 in Case 26/62 NV Algemene Transport- en Expeditie Onderneming van Gend & Loos v. Nederlandse administratie der belastingen [1963] ECR 1 at page 12. Article 12 of the Treaty establishing the European Economic Community[175] "must be interpreted as producing direct effects (*unmittelbare Wirkungen*) and creating individual rights which national courts must protect", the Court of Justice held at page 13 of its judgement.

In its judgement of 6 October 1970 in Case 9/70 Grad v. Finanzamt Traunstein [1970] ECR 825 the Court of Justice held in paragraph 5 that "to exclude in principle the possibility that persons affected may invoke the obligation imposed by a decision" under Article 189 of the Treaty establishing the European Economic Community[176] "would be incompatible with the binding effect attributed to decisions by Article 189…":

> "Although the effects of a decision may not be identical with those of a provision contained in a regulation[177], this difference does not exclude the possibility that the end result, namely the right of the individual to invoke the measure before the courts, may be the same as that of a directly applicable provision of a regulation".

[174] The word *unmittelbar* can also be translated as "immediate".

[175] "Member states shall refrain from introducing between themselves any new customs duties on imports or exports or any charges having equivalent effect, and from increasing those which they already apply in their trade with each other".

[176] A "decision" under Article 189 of the Treaty establishing the European Economic Community was defined in Article 189 as "binding in its entirety upon those to whom it is addressed".

[177] A "regulation" under Article 189 of the Treaty establishing the European Economic Community had "general application" and was described in Article 189 as "binding in its entirety and directly applicable in all member states".

A regulation under Article 189 of the Treaty establishing the European Economic Community "because of its nature and its purpose within the system of sources of Community law…has direct effect and is, as such, capable of creating individual rights which national courts must protect", the Court of Justice held in its judgement of 17 May 1972 in Case 93/71 Leonesio v. Ministero dell'agricoltura e foreste [1972] ECR 287 in paragraph 5.

In its judgement of 8 April 1976 in Case 43/75 Defrenne v. Société anonyme belge de navigation aérienne Sabena [1976] ECR 455 the Court of Justice held in paragraph 40 that the "the principle of equal pay contained in Article 119" of the Treaty establishing the European Economic Community[178] "may be relied upon before the national courts and that these courts have a duty to ensure the protection of the rights which this provision vests in individuals, in particular as regards those types of discrimination arising directly from legislative provisions or collective labour agreements, as well as in cases in which men and women receive unequal pay for equal work which is carried out in the same establishment or service, whether private or public". The "prohibition" of discrimination in Article 119 "applies not only to the action of public authorities, but also extends to all agreements which are intended to regulate paid labour collectively, as well as to contracts between individuals", the Court of Justice held in paragraph 39.

In its judgement of 19 January 1982 in Case 8/81 Becker v. Finanzamt Münster-Innenstadt [1982] ECR 53 the Court of Justice held in paragraph 25 that "wherever the provisions of a directive appear, as far as their subject-matter is concerned, to be unconditional and sufficiently precise, those provisions may, in the absence of implementing measures adopted within the prescribed period, be relied upon as against any national provision which is incompatible with the directive or in so far as the provisions define rights which individuals are able to assert against the state". In its judgement of 12 July 1990 in Case C-188/89 Foster and others v. British Gas plc [1990] ECR I-3313, the Court of Justice said in paragraph 18 that it had "held in a series of cases that unconditional and sufficiently precise provisions of a directive could be relied on against organizations or bodies which were subject to the authority or control of the state or had special powers beyond those which result from the normal rules applicable to relations between individuals".

[178] "Each member state shall…ensure and subsequently maintain the application of the principle that men and women should receive equal pay for equal work".

On 26 February 1986 the Court of Justice had held, in Case 152/84 Marshall v. Southampton and South-West Hampshire Area Health Authority [1986] ECR 723 in paragraph 48, that "a directive may not of itself impose obligations on an individual and that a provision of a directive may not be relied upon as such against such a person". "The case-law has drawn two inferences from this statement that a directive can have only 'ascending' vertical effect", Advocate General Philippe Léger explained in paragraph 66 of his opinion of 25 September 2003 in Case C-201/02 The Queen, on the application of Delena Wells v. Secretary of State for Transport, Local Government and the Regions [2004] ECR I-727:

> "First, directives do not have 'horizontal' direct effect, that is to say they cannot be invoked as such by an individual in proceedings against another individual.
>
> …
>
> Second, directives cannot have 'descending' vertical direct effect, which means that a national authority may not rely, as against an individual, upon a provision of a directive whose implementation in national law has not yet taken place".

A directive can have "vertical direct effect", Advocate General Ján Mazák reiterated in paragraph 110 of his opinion of 15 February 2007 in Case C-411/05 Palacios de la Villa v. Cortefiel Servicios SA [2007] ECR I-8535. "The Court has attributed this effect to directives – *despite* the wording of Article 249 EC which, as regards directives, does not refer to the conferral of rights on individuals…", he said in paragraph 108 of his opinion (emphasis added).

The Court of Justice "noted" in paragraph 22 of its judgement of 14 July 1994 in Case C-91/92 Faccini Dori v. Recreb Srl [1994] ECR I-3325 that "the case-law on the possibility of relying on directives against state entities is based on the fact that under Article 189 a directive is binding only in relation to 'each member state to which it is addressed'. That case-law seeks to prevent 'the state from taking advantage of its own failure to comply with Community law' ". "The effect of extending that case-law to the sphere of relations between individuals would be to recognize a power (*Befugnis*) in the Community to enact obligations for individuals with immediate effect, whereas it has competence to do so only where it is empowered to adopt regulations", the Court of Justice said in paragraph 22.

The principle of state liability (Staatshaftung)

"On the liability of the state for damage deriving from the violation of the obligations incumbent on it in virtue of Community law" is the heading of one of the sections of the Italian and French language versions of the judgement of 19 November 1991 of the Court of Justice in Joined Cases C-6/90 and C-9/90 Francovich and Danila Bonifaci and others v. Italian Republic [1991] ECR I-5357. "The most glaring violation of the separation of powers principle (*Gewaltenteilungsprinzip*) by the ECJ is its state liability judgement of November 1991", Norbert Blüm (1992, p. 105), the then German Federal Minister for Labour and Social Order, wrote in an article in the news magazine *Der Spiegel* on 30 November 1992. He quoted an article by Fritz Ossenbühl (1992, p. 995), then professor of public law at the University of Bonn, who, Blüm (1992, p. 107) wrote, "attests to the ECJ's 'law-creation (*Rechtsschöpfung*) in its purest form' ". The principle of state liability (in German, *Grundsatz der Staatshaftung*) is one of the Court-created constitutional principles of Union law.

The "issue" of "the existence and scope of a state's liability for loss and damage resulting from breach of its obligations under Community law" was "raise[d]" in a question referred to the Court of Justice under Article 177 of the Treaty establishing the European Economic Community by the *Pretura*[179] of Vicenza and *Pretura* of Bassano del Grappa in Joined Cases C-6/90 and C-9/90 Francovich and Danila Bonifaci and others v. Italian Republic [1991] ECR I-5357. "That issue must be considered in the light of the general system of the Treaty and its fundamental principles", the Court of Justice said in paragraph 30 of its judgement of 19 November 1991.

In its judgement of 19 November 1991 in Joined Cases C-6/90 and C-9/90 Francovich and Danila Bonifaci and others v. Italian Republic [1991] ECR I-5357 the Court of Justice held in paragraph 35 of the Italian and French language versions that "the principle of the liability of the state for damage caused to individuals by violations of Community law imputable to it is inherent in the system of the Treaty". As Blüm (1992, p. 105) related, "the Court of Justice interpreted…the principle of state liability into the existing EEC Treaty as implicitly given therein".

[179] A *pretura* was a court of first instance in Italy. The term is often translated as magistrate's court.

"A further basis" for the principle of state liability "is to be found in Article 5" of the Treaty establishing the European Economic Community[180] because member states have an "obligation to to nullify the unlawful consequences of a breach of Community law", the Court of Justice argued in paragraph 36 of its judgement of 19 November 1991 in Joined Cases C-6/90 and C-9/90 Francovich and Danila Bonifaci and others v. Italian Republic [1991] ECR I-5357. The Court of Justice cited its judgement of 16 December 1960 in Case 6/60 Humblet v. Belgian State [1960] ECR 559 "in relation to" Article 86 of the Treaty establishing the European Coal and Steel Community[181] and described it as an "analogous provision" to Article 5 of the Treaty establishing the European Economic Community. The Court of Justice had in its judgement of 16 December 1960 held, at page 569, that "if the Court rules in a judgement that a legislative or administrative measure adopted by the authorities of a member state is contrary to Community law, that member state is obliged, by virtue of Article 86 of the ECSC Treaty, to rescind the measure in question *and to make reparation for any unlawful consequences which may have ensued*" (emphasis added).

"From all of the preceding it follows that Community imposes the principle according to which the member states are obliged to compensate for the damage caused to individuals by violations of Community law imputable to the state", the Court of Justice reasoned in paragraph 37 of the Italian language version of its judgement of 19 November 1991.

The Court of Justice then defined the "conditions" under which state liability "gives rise to a right to reparation" where, "as in this case, a member state fails to fulfill its obligation under the third paragraph of Article 189 of the Treaty [establishing the European Economic Community] to take all the measures necessary to achieve the result prescribed by a directive". The Court of Justice said in paragraphs 42 and 43 of the Italian language version that "it is within the ambit of the norms of national law relating to liability that the state is required to repair the consequences of the damage caused" and the "conditions, formal and substantive, established by the various national laws on the subject of compensation for damage may not be less favourable than those concerning internal claims similar in nature and may not be devised in a way that renders obtaining compensation practically impossible or excessively difficult".

[180] "Member states shall take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations arising out of this Treaty or resulting from action taken by the institutions of the Community".

[181] "Member states undertake to take all appropriate measures, whether general or particular, to ensure fulfillment of the obligations resulting from decisions and recommendations of the institutions of the Community...".

In Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur SA v. Federal Republic of Germany and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and others [1996] ECR I-1029 the German *Bundesgerichtshof*[182] and the English High Court referred questions to the Court of Justice under Article 177 of the Treaty establishing the European Community to "establish" if the principle of state liability is "applicable" if the infringement of Community law is attributable to the national legislature. In its judgement of 5 March 1996 the Court of Justice "stressed" in paragraph 25 that "the existence and extent of state liability for damage ensuing as a result of a breach of obligations incumbent on the state by virtue of Community law are questions of Treaty interpretation which fall within the jurisdiction of the Court [of Justice]". The Court of Justice then said in paragraph 27:

> "Since the Treaty [establishing the European Community] contains no provision expressly and specifically governing the consequences of breaches of Community law by member states, it is for the Court, in pursuance of the task conferred on it by Article 164 of the Treaty of ensuring that in the interpretation and application of the Treaty the law is observed, to rule on such a question in accordance with generally accepted methods of interpretation, in particular by reference to the fundamental principles of the Community legal system and, where necessary, general principles common to the legal systems of the member states".

The principle identified in the judgement of 19 November 1991 in Joined Cases C-6/90 and C-9/90 Francovich and Danila Bonifaci and others v. Italian Republic [1991] ECR I-5357 – "the principle of the liability of the state for damage caused to individuals by violations of Community law imputable to it…" – "holds good for any case in which a member state breaches Community law, whatever be the organ of the state whose act or omission was responsible for the breach", the Court held in paragraph 32 of its judgement of 5 March 1996 in Joined Cases C-46/93 and C-48/93 Brasserie du Pêcheur SA v. Federal Republic of Germany and The Queen v. Secretary of State for Transport, ex parte Factortame Ltd and others [1996] ECR I-1029. The "reply" of the Court of Justice to the national courts "must be that the principle that member states are obliged to make good damage caused to individuals by breaches of Community law attributable to the state is applicable where the national legislature was responsible for the breach in question"[183], the Court said in paragraph 36.

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[182] Federal Court.

[183] In the German language version, "…where the alleged breach is attributable to the national legislature (*wenn der zur Last gelegte Verstoß dem nationalen Gesetzgeber zuzuschreiben ist*)".

The German *Bundesgerichtshof*[184] and the English High Court had also asked the Court of Justice to "specify the conditions" under which Community law "guaranteed" a right to compensation. The Court of Justice held in paragraph 51 that Community law "confers" a right to compensation "where three conditions are met":

1. the legal norm "infringed must be intended to confer rights on individuals";
2. "the breach must be sufficiently serious"; and,
3. "there must be a direct causal link between the breach of the obligation resting on the state and the damage sustained by the injured parties".

The Court of Justice has "stated", it said in paragraph 86 of Opinion 1/09 of 8 March 2011 [2011] ECR I-1137, "that the principle that a member state is obliged to make good damage caused to individuals as a result of breaches of European Union law for which it is responsible applies to any case in which a member state infringes European Union law, whichever is the authority of the member state whose act or omission was responsible for the breach, and that principle also applies, under specific conditions, to judicial bodies (see, to that effect, Case C-224/01 Köbler [2003] ECR I-10239, paragraphs 31 and 33 to 36; Case C-173/03 Traghetti del Mediterraneo [2006] ECR I-5177, paragraphs 30 and 31, and judgement of 12 November 2009 in Case C-154/08 Commission v. Spain, paragraph 125)".

In Case C-224/01 Köbler v. Republik Österreich [2003] ECR I-10239 the Court of Justice held in paragraph 36 of the German language version of its judgement of 30 September 2003 that "the protection of the rights of individuals who rely on Community law requires, necessarily, that they must be entitled to claim before a national court compensation for damage that is attributable to the violation of their rights by a decision of a court of last instance".

The Court of Justice "stressed" in paragraph 34 that a court of last instance "is by definition the last judicial body before which individuals may assert the rights conferred on them by Community law. Since an infringement of those rights by a final decision of such a court cannot thereafter normally be corrected, individuals cannot be deprived of the possibility of rendering the state liable in order in that way to obtain legal protection of their rights". The Court of Justice held in paragraph 53, however, that a member state is liable for a decision contrary to Community law of a national court of last instance "only in the exceptional case where the court has manifestly infringed the applicable law (*nur in dem Ausnahmefall, dass das*

[184] Federal Court.

Gericht offenkundig gegen das geltende Recht verstoßen hat)". "In order to determine whether that condition is satisfied, the national court" hearing an action for damages "must take account of" all aspects of the individual case including, "in particular, the degree of clarity and precision of the rule infringed, whether the infringement was intentional", the excusability of the legal error, "the position taken, where applicable, by a Community institution" and the breach by the court in question of the obligation to refer (*Vorlagepflicht*) under Article 234 paragraph 3 EC[185], the Court of Justice said in paragraphs 54 and 55. "In any event," a decision made in manifest disregard of the relevant case-law of the Court of Justice "will be" a sufficiently serious infringement of Community law, the Court declared in paragraph 56.

The judgement of 12 November 2009 of the Court of Justice in Case C-154/08 Commission of the European Communities v. Kingdom of Spain was published in Spanish[186] and French[187] only. In paragraph 125 of this judgement the Court of Justice, to quote the French language version, "noted that it follows from the case-law of the Court that a breach by a member state can be, in principle, found under Article 226 EC[188] whatever the organ of the state whose action or inaction is the orgin of the breach, even if it is a constitutionally independent institution (judgement of 9 December 2003, Commission/Italy, C‑129/00, Rec. p. I‑14637 paragraph 29 *and case-law cited*)" (emphasis added).

[185] Now Article 267 of the Treaty on the Functioning of the European Union.

[186] Spanish was the procedural language.

[187] French is the "internal working language" of the Court of Justice of the European Union (House of Lords Committee on the European Union, 2011, p. 22).

[188] Article 226 of the Treaty establishing the European Community (OJ C 321E, 29.12.2006, p. 144) – now Article 258 of the Treaty on the Functioning of the European Union (OJ C 83, 30.3.2010, p. 160).

The principle of the protection of fundamental rights (Grundrechtsschutz)

What the Constitutional Court of the Czech Republic, in judgement Pl. ÚS 50/04 of 8 March 2006[189], termed the "implementation" of the protection of fundamental rights (*Grundrechtsschutz*) in the case-law of the Court of Justice of the European Union is discussed in this section.

"The limiting of state authority (*Staatsgewalt*) by the fundamental rights (*Grundrechte*) and human rights of the individual is one of the most outstanding achievements of the modern constitutional state (*Verfassungsstaat*)", Professor Rudolf Bernhardt (1976a, p. 25; 1976b, p. 25), the then Director of the *Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht*[190], Heidelberg, wrote in a study commissioned by the Commission of the European Communities and published in 1976 on the "problems of a catalogue of fundamental rights for the European Communities". The "extent, forms and means of fundamental rights protection (*Grundrechtsschutz*) vary from state to state and reflect the influences of history and different traditions" of the member states but "the fact that there is this fundamental constraint" on state authority "is not in question", Bernhardt (1976a, p. 25; 1976b, p. 25) wrote. "The classical fundamental and human rights were and are intended to protect the individual from undue interference by state authority (*Staatsgewalt*) in his personal and individual development" (Bernhardt, 1976a, p. 26; 1976b, p. 26). "Fundamental rights, and catalogues thereof, have hitherto always been intended to set limits to the sovereign and inherently boundless authority (*Gewalt*) of the state" (Bernhardt, 1976a, p. 28; 1976b, p. 27).

"Prior to recognizing in its case-law that fundamental rights did apply in the Community legal order, the Court of Justice took a negative attitude toward fundamental rights recognition", Gil Carlos Rodríguez Iglesias, the then President of the Court of Justice, admitted in an article published in 1995 (p. 171). The Constitutional Court of the Czech Republic, in judgement Pl. ÚS 50/04 of 8 March 2006, referred to "the early reluctance…expressed in the…case-law" of the Court of Justice…to accord protection [of fundamental rights] by means of Community law". The Constitutional Court mentioned as an example of this the judgement of the Court of Justice in Case 1/58 Friedrich Stork et Cie c. Haute Autorité de la Communauté européenne du charbon et de l'acier, Rec. 1959, p. 43.

[189] http://www.concourt.cz/view/pl-50-04

[190] Max Planck Institute for Foreign Public Law and International Law. Bernhardt subsequently became the President of the European Court of Human Rights.

In Case 1/58 Friedrich Stork et Cie c. Haute Autorité de la Communauté européenne du charbon et de l'acier, Rec. 1959, p. 43[191] the applicant company, Friedrich Stork et Cie, had alleged that the High Authority of the European Coal and Steel Community had not "respected certain fundamental rights that are protected in almost all the constitutions of the member states and which serve to limit the application of the Treaty". The applicant company referred "in particular" to the right to the free unfolding of personality in Article 2 of the German *Grundgesetz* and the right to practice one's occupation in Article 12 of the *Grundgesetz*. The Court of Justice, however, held at page 64 that it had, in accordance with Article 31 of the Treaty establishing the European Coal and Steel Community, "only (*qu'à*)" to "ensure that in the interpretation and application of this Treaty, and of rules laid down for the implementation thereof, the law is observed" but not as a general rule (*qu'en règle générale*) to pronounce on national legislation and that "in consequence (*qu'en consequence*)" it could not examine (*elle ne saurait examiner*) "the complaint that, in making its decision, the High Authority had violated principles of German constitutional law (in particular Articles 2 and 12 of the *Grundgesetz*)". In Joined Cases 36/59, 37/59, 38/59 and 40/59 Präsident Ruhrkolen-Verkaufsgesellschaft mbH, Geitling Ruhrkohlen-Verkaufsgesellschaft mbH, Mausegatt Ruhrkohlen-Verkaufsgesellschaft mbH and I Nold KG v. High Authority of the European Coal and Steel Community [1960] ECR 423, the applicant "supported its arguments with German case-law on the interpretation of Article 14" of the German *Grundgesetz*, "which guarantees private property", but the Court of Justice held at page 438 of its judgement of 15 July 1960:

> "It is not for the Court, whose function is to judge the legality of decisions adopted by the High Authority and, as obviously follows, those adopted in the present case under Article 65 of the Treaty[192], to ensure that rules of internal law, even constitutional rules, enforced in one or other of the member states are respected. Therefore the Court may neither interpret nor apply Article 14 of the German [*Grundgesetz*] in examining the legality of a decision of the High Authority".

"The first reference to fundamental rights as an integral part of Community law is found in the Stauder judgement of 12 November 1969", Gil Carlos Rodríguez Iglesias (1995, p. 171) noted. In paragraph 7 of its judgement in Case 29/69 Stauder v. City of Ulm [1969] ECR 419 the Court

[191] The French language version of this judgement has been used.

[192] The Treaty establishing the European Coal and Steel Community of 18 April 1951.

of Justice held that the fundamental rights of the individual were included in (*enthaltenen*) the general principles of the Community legal order (*den allgemeinen Grundsätzen der Gemeinschaftsrechtsordnung*) and "protected by the Court".

In Case 11/70 Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125 the *Verwaltungsgericht*[193] in Frankfurt am Main had "refused to accept" the "validity" of Regulation 120/67/EEC of 13 June 1967 and Regulation 473/67/EEC of 21 August 1967 because they were "contrary to certain structural principles of national constitutional law". In a section headed "On the protection of fundamental rights in the Community legal order (*Zum Grundrechtsschutz in der Gemeinschaftsrechtsordnung*)" the Court of Justice held in paragraph 3 of its judgement of 17 December 1970 that the "validity of measures adopted by the institutions of the Community…can only be judged in the light of Community law" and not with reference to norms or principles of national law:

> "Therefore the validity of a Community measure or its effect within a member state cannot be affected by allegations that it runs counter to either fundamental rights as formulated by the constitution of that state or the principles of a national constitutional structure".

However, in paragraph 4 of this judgement the Court of Justice stated that "an examination should be made as to whether or not any *analogous* guarantee *inherent in Community law* has been disregarded" (emphasis added). To quote the Italian language version, the Court of Justice held that the protection of fundamental rights is "an integral part of the general legal principles the observance of which the Court of Justice guarantees". The "safeguarding of these rights", according to the French language version, "must be assured within the context of the structure and the objectives of the Community".

The Court of Justice "reveal[ed] a new attitude" in its judgement of 12 November 1969 in Case 29/69 Stauder v. City of Ulm [1969] ECR 419 and its judgement of 17 December 1970 in Case 11/70 Internationale Handelsgesellschaft mbH v. Einfuhr- und Vorratsstelle für Getreide und Futtermittel [1970] ECR 1125, the Commission of the European Communities subsequently observed (1976a, p. 8). The Court of Justice "went one step further" on 14 May 1974 in Case 4/73 J. Nold, Kohlen- und Baustoffgroßhandlung v. Commission of the European Communities

[193] Administrative Court.

[1974] ECR 491 (Commission of the European Communities, 1976a, p. 9). The Court of Justice noted in paragraph 13 of its judgement of 14 May 1974 that it had already decided that "fundamental rights (*Grundrechte*) form an integral part of the general principles of law (*allgemeinen rechtsgrundsätzen*), the observance of which it ensures. In safeguarding these rights, the Court is", it said, "bound to draw inspiration from constitutional traditions common to the member states…". The Court of Justice clarified that it "cannot therefore uphold measures which are incompatible with fundamental rights recognized and protected by the constitutions" of the member states. "Similarly," it added, "international treaties for the protection of human rights on which the member states have collaborated or of which they are signatories, can supply guidelines which should be followed within the framework of Community law".

"The Court has consistently held[194]", it reiterated in paragraph 17 of its judgement of 13 July 1989 in Case 5/88 Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft [1989] ECR 2609, that "fundamental rights form an integral part of the general legal principles (*allgemeinen Rechtsgrundsätzen*), the observance (*wahren*) of which is ensured by the Court":

> "In safeguarding those rights, the Court has to look to the constitutional traditions common to the member states, so that measures which are incompatible with the fundamental rights recognized by the constitutions of those States may not find acceptance in the Community. International treaties concerning the protection of human rights on which the member states have collaborated or to which they have acceded can also supply guidelines to which regard should be had in the context of Community law".

In the following paragraph the Court of Justice said that the "fundamental rights recognized by the Court are not absolute (*uneingeschränkte*), however, but must be considered in relation to their social function". The Court held that "restrictions may be imposed on the exercise of those rights… provided that those restrictions in fact correspond to objectives of general interest pursued by the Community and do not constitute, with regard to the aim pursued, a disproportionate and intolerable interference, impairing the very substance of those rights"[195].

[194] In the German language version this sentence begins, "According to settled case-law… (*Nach ständiger Rechtsprechung*…)".

[195] This was restated by the Court of Justice in paragraph 68 of its judgement of 10 July 2003 in Joined Cases C-20/00 and C-64/00 Booker Aquaculture Ltd and Hydro Seafood GSP Ltd v. The Scottish Ministers [2003] ECR I-7411.

"The incorporation of fundamental rights into the Community legal order", the then President of the Court of Justice wrote in 1995, "is being realized by the Court of Justice through the application" of "general principles" – "a category of rules which are pre-eminently substantive and not linked to a particular channel of 'normative production' " (Rodríguez Iglesias, 1995, p. 171-172). These "general principles" are, he said, "used in the case-law as a source of Community law particularly suitable for filling the gaps in the system" (Rodríguez Iglesias, 1995, p. 172). The "common standard for protecting fundamental rights" is "defined" by the Court of Justice "on the basis of a critical comparison and evaluation of the national legal systems – an evaluation that, of course, includes an examination of the relevant national case-law – culminating in a judicial choice that does not necessarily rule out creativity on the part of the Court of Justice itself", the then President of the Court of Justice said (Rodríguez Iglesias, 1995, p. 173).

The Court of Justice stated in paragraph 37 of its judgment of 13 April 2000 in Case C-292/97 Kjell Karlsson and others [2000] ECR I-2737 that "it should be remembered that the requirements flowing from the protection of fundamental rights in the Community legal order are also binding on member states when they implement Community rules. Consequently, member states must, as far as possible, apply those rules in accordance with those requirements". The Court cited paragraph 16 of its judgement of 24 March 1994 in Case C-2/92 Bostock [1994] ECR I-955. In paragraph 58 of its judgement in C-292/97 Kjell Karlsson and others [2000] ECR I-2737 the Court held that "when a member state imposes restrictions on the exercise of fundamental rights it must observe the principle of proportionality": "In accordance with that principle, the restriction must not constitute, having regard to the aim pursued, disproportionate and unreasonable interference undermining the very substance of those rights". The Court cited paragraph 18 of its judgement of 13 July 1989 in Case 5/88 Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft [1989] ECR 2609. "According to the settled case-law of the Court of Justice[196] the principle of proportionality is one of the general principles (*allgemeinen Grundsätzen*) of Community law", the Court stated in paragraph 13 of its judgement of 13 November 1990 in Case C-331/88 The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa and others [1990] ECR I-4023. This was "recalled" by the Court on 5 May 1998 in paragraph 96 of its judgement in Case C-180/96 United Kingdom of Great Britain and Northern Ireland v. Commission of the European Communities [1998] ECR I-2265, when it held that the principle of proportionality "requires that measures adopted by Community institutions do not exceed the limits of what is

[196] This is from the German language version. In the English language version the sentence begins, "The Court has consistently held…".

appropriate and necessary in order to attain the objectives legitimately pursued by the legislation in question; when there is a choice between several appropriate measures recourse must be had to the least onerous, and the disadvantages caused must not be disproportionate to the aims pursued"[197].

Advocate General Christine Stix-Hackl, in paragraphs 57-66 of her opinion of 18 March 2004 in Case C-36/02 Omega Spielhallen- und Automatenaufstellungs-GmbH v. Oberbürgermeisterin der Bundesstadt Bonn [2004] ECR I-9611, discussed how the requirement of conformity with fundamental rights (*l'esigenza di conformità ai diritti fondamentali*; *der Anspruch auf Grundrechtskonformität*) is "realized (*realizzata*; *verwirklicht*)…in the in the case-law of the Court of Justice.

"It is clear from the case-law" of the Court of Justice, the Court of Justice said in paragraph 284 of its judgement of 3 September 2008 in Joined Cases C-402/05 P and C-415/05 P Yassin Abdullah Kadi and Al Barakaat International Foundation v. Council of the European Union and Commission of the European Communities [2008] ECR I-6351, "that respect for human rights is a condition of the lawfulness (*eine Voraussetzung für die Rechtmäßigkeit*; *une condition de la légalité*) of Community acts (Opinion 2/94, paragraph 34) and that measures incompatible with respect for human rights are not acceptable in the Community (Case C‑112/00 Schmidberger [2003] ECR I‑5659, paragraph 73 and case-law cited)".

"*The Court's settled case-law*…states, in essence, that the fundamental rights guaranteed in the legal order of the European Union are applicable in all situations governed by...Union law...", the Grand Chamber of the Court of Justice said in paragraph 19 of its judgement of 26 February 2013 in Case C‑617/10 Åklagaren v. Åkerberg Fransson [2013] ECR I-0000 (emphasis added). The Grand Chamber held in paragraph 21:

> "Since the fundamental rights guaranteed by the Charter [of Fundamental Rights of the European Union (OJ C 83, 30.3.2010, p. 389)] must therefore be complied with where national legislation falls within the scope of...Union law, situations cannot exist which are covered in that way by...Union law without those fundamental rights being applicable. *The applicability of...Union law*

[197] The Court of Justice cited paragraph 13 of its judgement of 13 November 1990 in Case C-331/88 The Queen v. Minister of Agriculture, Fisheries and Food and Secretary of State for Health, ex parte Fedesa and others [1990] ECR I-4023 and paragraph 41 of its judgement of 5 October 1994 in Joined Cases C-133/93, C-300/93 and C-362/93 Antonio Crispoltoni v. Fattoria Autonoma Tabacchi and Giuseppe Natale and Antonio Pontillo v. Donatab Srl [1994] ECR I-4863.

> *entails applicability of the fundamental rights guaranteed by the Charter*" (emphasis added).

Article 1 paragraph 1 of Protocol No. 30 (OJ C 83, 30.3.2010, p. 313) to the Treaty on the Functioning of the European Union provides that the Charter of Fundamental Rights of the European Union "does not extend the ability of the Court of Justice of the European Union, or any court or tribunal of Poland or of the United Kingdom, to find that the laws, regulations or administrative provisions, practices or action of Poland or of the United Kingdom are inconsistent with the fundamental rights, freedoms and principles that it reaffirms" but the Grand Chamber of the Court of Justice, in paragraph 120 of its judgement of 21 December 2011 in Joined cases C-411/10 and C-493/10 N.S. v. Secretary of State for the Home Department and M.E. and others v. Refugee Applications Commissioner and Minister for Justice, Equality and Law Reform [2011] ECR I-13905, held that Article 1 paragraph 1 of Protocol No. 30 "does not intend to exempt the Republic of Poland or the United Kingdom from the obligation to comply with the provisions of the Charter or to prevent a court of one of those member states from ensuring compliance with those provisions".

"According to the wording" of Article 1 paragraph 1, Protocol No. 30 "does not call into question the applicability of the Charter in the United Kingdom or in Poland, a position which is confirmed by the recitals in the preamble to that protocol", the Grand Chamber said in paragraph 119 of the judgement:

> "Thus, according to the third recital in the preamble to Protocol No. 30, Article 6 TEU requires the Charter to be applied and interpreted by the courts of Poland and of the United Kingdom strictly in accordance with the explanations referred to in that article. In addition, according to the sixth recital in the preamble to that protocol, the Charter reaffirms the rights, freedoms and principles recognized in the Union and makes those rights more visible, but does not create new rights or principles".

According to the fifth recital in the preamble to the Charter of Fundamental Rights, the Charter "reaffirms" the fundamental rights that "result, in particular, from the constitutional traditions and international obligations common to the member states, the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Social Charters adopted by the

Union and by the Council of Europe and *the case-law of the Court of Justice of the European Union* and of the European Court of Human Rights" (emphasis added).

The Court of Justice created as "constitutional" principles of Union law the principle of the precedence (*Vorrang*) of Union law, the principle of direct effect *(unmittelbare Wirkung*), the principle of state liability (*Staatshaftung*) and the principle of the protection of fundamental rights (*Grundrechtsschutz*). It and all constitutional courts and supreme courts[198] create law through their case-law.

[198] At a conference in Bled in 2004 the President of the Court of Justice, Vassilios Skoiris (2004, p. 4), characterized the Court of Justice as "a hybrid court performing both the functions of a supreme and a constitutional court".

Chapter 5

Hermann Kantorowicz (18.11.1877 – 12.2.1940), Eugen Ehrlich (14.9.1862 – 2.5.1922), François Gény (17.12.1861 – 16.12.1959), Josef Kohler (9.3.1849 – 3.8.1919), Oskar Bülow (11.9.1837 – 19.11.1907) and Eugen Huber (13.7.1849 – 23.4.1923) are the principal representatives of the free law movement. The work of each in relation to the free law doctrine is outlined in this chapter.

"The name free law movement (*freirechtliche Bewegung*) and condensation of hitherto unassociated, individual utterances into a unified movement is the result of a pamphlet which appeared in the year 1906…with the title *Der Kampf um die Rechtswissenschaft*[199]..." (Radbruch, 1990, p. 195; Kantorowicz, 1906, p. 13). Gustav Radbruch (21.11.1878 – 23.11.1949), in a review published in 1907 of Hermann Kantorowicz's *Der Kampf um die Rechtswissenschaft*, said that free law "is, like natural law, law that claims to apply independently of state power but it differs from natural law in two respects"[200] (Radbruch, 1907, p. 242):

1. Free law "is not everywhere and forever the same"; and,
2. Free law "is not from nature, but positive, in virtue of an underlying psychological reality (power, will, recognition)".

"The common fundamental trait (*Grundzug*) of all adherents" of the free law movement, Kantorowicz wrote in an article published in 1908, is "the cognizance (*Erkenntnis*) that judgements actually are not and cannot be merely applications of statutes, and the demand that legal science has accordingly to search for methods in conformity with which the extra-statutory (*außergesetzlichen*), subsidiary sources of law ('free law') are to be treated" (Kantorowicz, 1908d, p. 869-870). The "extra-statutory (*außergesetzlichen*), subsidiary sources of law ('free law')" were described as "*subsidiary* non-state sources of law ('free law')" in an article by Kantorowicz (1908b, p. 70) published in the same year (emphasis in original).

[199] The struggle for legal science.

[200] "Natural law does not exist: the law (*das Recht*) is not immutable, is not buried deep in the human heart, is not an abstraction, which may follow deductively from *a priori* philosophical considerations – it is on the contrary a product of the requirements of societal living (*Gesellschaftslebens*) and together with the latter is subject to a continual fluctation", Dniestrzański (1906, p. 164) wrote.

Free interpretation and the free formation of the law

Hermann Kantorowicz (18.11.1877 – 12.2.1940)

In 1939 Kantorowicz (1958, p. 79) defined "law" as "*a body of social rules prescribing external conduct and considered justiciable*". This was the "final form" of his definition of the term "law". It "improved", he said, "some of the details of the contents and terminology" of a "definition" he used in 1927 and which was published in a journal article in 1928. The earlier definition, from a "summary" he wrote for a seminar in 1927 on "Theory of Judicial Decisions"[201], stated: "By the term 'law', we mean the totality[202] of those rules of external conduct, to whose application a judge is appropriate" (Kantorowicz, 1928, p. 687). "The prevailing opinion", Kantorowicz (1958, p. 23) wrote in 1939, "has always rightly considered law to consist of rules, although the treatment of this category has rarely been sufficiently broad. The element of recognition, for instance, has been analyzed, chiefly by Bierling's *Anerkennungstheorie*[203], with regard to law alone, although it is inherent in every kind of rule". Kantorowicz (1958, p. 72-73) defined legal rules as "rules which are considered fit to be applied by judicial organs". " 'Considered' should be used with regard to those who actually apply the rules or wish them to be applied", he specified (Kantorowicz, 1958, p. 73).

"There are and always have been many rules which are not obeyed by the subjects, not applied by the courts of law, not guaranteed by other rules, nor even meant to be obeyed, applied, guaranteed" (Kantorowicz , 1958, p. 72)[204]. "Consequently, in all definitions of law a subjective criterion ought to be inserted, to the effect that the rule is *intended* to be, or recognized as *suitable* for being, obeyed by the subjects, applied by the courts, guaranteed by other rules, or made the law in force". "Rules may be said to constitute a *body* when they all possess some

[201] Kantorowicz's "summary" of his seminar in 1927 on "Theory of judicial decisions" was published in the *Columbia Law Review* in 1928.

[202] "The *totality* is either a material one, composed according to its contents, e.g., constitutional law" or criminal law "or an historical one, composed according to the local, temporal, ethnical, or national characteristics of the law, e.g., the European, the present, the Roman, the Austro-Hungarian laws".

[203] Theory of recognition. See chapter 7.

[204] This, he said, "happens for various reasons: some rules refer to very rare events, or remote possibilities, some on the contrary are either constantly infringed or constantly obeyed and therefore do not give occasion for litigation. These rules may nevertheless be so intimately linked to rules of undoubtedly legal character that they must be, are indeed always are, treated together with them, in the same books, or in the same codes, by the same lawyers, by the same juristic methods, and thus must be considered law. The same is true of rules that do not claim to be the law actually in force, but the law as it ought to be, such as draft bills, which are so often the subject of a literature of scientific value and methodologically of the same character as books of the law in force" (Kantorowicz, 1958, p. 72).

common characteristic which renders them coherent and interdependent…"[205], Kantorowicz (1958, p. 21) wrote in 1939. " '*Rules*'…do not state what happens, but what ought to happen under certain circumstances. It is, therefore, essential for any rule, that its contents are acknowledged as something that ought to be done. This distinguishes rules from general statements which only describe *de facto* habits (economic, linguistic or social)…". Rules that are "considered fit to be applied by a judicial organ in some definite procedure" are "justiciable" (Kantorowicz, 1958, p. 79). Kantorowicz (1958, p. 69) defined a "judicial organ" as "a definite authority concerned…the application of principles to individual cases of conflict between parties". "Many of the elements of this concept call for explanation and justification", he admitted (Kantorowicz, 1958, p. 69-71):

(a) "The 'principles' in which we are here interested are rules…
We shall…speak of judicial organs wherever rules of *any* kind are applied".

(b) "The 'authority' may be an individual, whom we may then call a judge…or a 'court' composed of two, three, or even hundreds of judges such as a…parliament (acting in a judicial capacity). The authority must be recognized (within the group in which the rule is to be applied obtains) as an organ of the group endowed with representative character of some kind and entitled to obedience or at least respect".

(c) "The 'application' of the rule is not to be understood as a necessarily conscious application; consciousness is a quality which it does not always possess even in highly developed stages of legal culture. In early stages…a mere factual conformity of decision and procedure to traditional rules is all that exists and all that is demanded by those concerned"[206].

(d) " 'Conflict' presupposes that the aims of the parties are incompatible with each other, but they are nevertheless concerned with 'social relations', i.e. mutual impacts of conduct. This excludes theoretical differences of opinion or factual divergences of interest".

[205] For instance, "that they have the same content" – Kantorowicz specifies criminal law – or "belong to the same code or to the same state, originate from the same nation, or coincide in time or space…".

[206] "If there is no such conformity, we have mere arbitrary decisions which should not be called…judicial…" (Kantorowicz, 1958, p. 70).

(e) The ‘parties’ engaged in the conflict may be individual members of the group, or the individual *versus* the group, or sub-groups against each other, or…different groups possessing different legal systems, e.g. states”.

Legal rules “can and must be described in terms of legal duties imposed…by legal prescriptions…” (Kantorowicz, 1958, p. 38). Every legal rule, “permissive rules not excluded, can be expressed in the form of prescriptions”. Legal rules are, Kantorowicz (1958, p. 40) asserted, “best expressed in terms of prescriptions, however convenient it may be on linguistic or technical grounds to cloak them in the form of entitling, enabling or permissive rules, and…the legal rights in which these rules are actualized are best described in terms of duties”. Legal duties are “created by prescriptions of the general and abstract law being divested of their hypothetical character and individualized through their application to the concrete conduct of individuals” (Kantorowicz, p. 1958, p. 38). The “rule” that “ ‘if a thing has been bought, the agreed price ought to be paid by the buyer to the vendor’ now becomes ‘since Peter bought this car from Paul for the agreed price of £165, he ought to pay Paul this sum’, and this duty of Peter normally exhausts the legal right of Paul…” (Kantorowicz, 1958, p. 38).

Kantorowiz (1958, p. 73) admitted that “defining law, not with the help of the notion of ‘courts of law’, but with that of judicial organs” leads to “a serious difficulty” in that “judicial organs in the untechnical sense…are not wanting” in, for example, “the sphere of…manners”. He “therefore…introduce[d] a further distinction” (Kantorowicz, 1958, p. 73-74):

> “Wherever we find rules of external conduct applied by judicial organs we find them applied either with some more or less ‘definite’ procedure, or without such procedure. In the first case we are faced with what we propose to call law…
>
> This ‘definiteness’ may pervade the whole of the procedure; or it may attach to single phases or aspects of it only. Examples of the latter kind are: (a) only definite parts of the day, or definite days…of the week, the month, the year, and only certain places…are eligible for the procedure; (b) the acts of the persons involved as parties (or their representatives), judges, counsel, witnesses, court officers, follow in a definite order; (c) only definite words may be spoken, and only certain symbols used…; (d) only definite kinds of evidence…are recognized; (e) only definite kinds and forms of decision and execution are admitted, and so on”.

A person's "*conduct*" is the "object" of legal rules (Kantorowicz, 1928, p. 688-689). That conduct is "in respect to form, either action or omission; in respect to contents, application or observance of the rules; in respect to extension, any conduct whatever (there being no *rechtsleerer Raum*[207]…); in respect to its personal subjects, conduct of natural persons, or of corporations; and in respect to its object, only external, that is corporal conduct".

Psychological "conduct is very important for the formulation and the application of the rules of law (e.g., malice, intention, negligence, error), but it never forms the object of such rules":

> "That is, law never prescribes a certain psychical [psychological] conduct, e.g., to have a certain will or certain emotions; it suffices for a person to act externally *as if he had* that will or those emotions. This is the essential difference between the rules of law and those of religion or morality. Consequently lawful conduct is also external in the Kantian sense of legality (as opposed to morality). For if law is not addressed to will at all, it is still less interested in what might be the motive of the will, provided the will is externally in conformity to the law. On the contrary, from the moral standpoint the motive decides whether an action is good or bad" (emphasis added).

Kantorowicz (1958, p. 25) explained that "rules of conduct prescribe a conduct which may or may not be real but *ought* to be real". He affirmed the "dualism of facts and rules", which, he said, "has been…elaborately proved by several German schools of general and legal philosophy: the Marburg School (Hermann Cohen [4.7.1842 – 4.4.1918], Paul Natorp [24.1.1854 – 17.8.1924], Rudolf Stammler [19.2.1856 – 25.4.1938]), the South-western [or Baden] School (Wilhelm Windelband [11.5.1848 – 22.10.1915], Heinrich Rickert [25.5.1863 – 25.7.1936], Max Weber [21.4.1864 – 14.6.1920], Emil Lask [25.9.1875 – 26.5.1915], Gustav Radbruch [21.11.1878 – 23.11.1949]), the Viennese School (Hans Kelsen [11.10.1881 – 9.4.1973] and his followers)" (Kantorowicz, 1958, p. 25-26). "All go back", Kantorowicz said, "to Kantian criticism, and particularly to Kant's distinction between *Wert* [value] and *Wirklichkeit* [reality]". Anyone "who declares that some human conduct *ought* to be, recognizes a twofold duty imposed on a person" (Kantorowicz., 1958, p. 23-24):

[207] Legal vacuum. (Literally, law-empty space.)

> "The primary duty of the person is to conduct himself in a way in which he or others might possibly *not* conduct themselves; there is no point in applying the category of the 'ought' to conduct that could not possibly be different from what it actually is. The secondary duty of the person is to submit, if he should fail to comply with the primary duty, to some kind of sanction. This sanction may be social, legal, moral or religious, and may range from a mild disapproval to the severest punishment. Both duties may be our own or other persons' duties. In the first case alone there is genuine volition, for human beings can 'will' nothing but their own conduct. In the second case we express a mere desire that other persons should will their own conduct; but this will of theirs is liable to be influenced by the way in which we express our desire and the sanctions we connect with it".

"The primary as well as the secondary duty contained in the category of the 'ought' is dependent on other duties" (Kantorowicz, 1958, p. 24). "Neither would be recognized if there were not higher duties justifying the lower duties, satisfying the peremptory question, '*why* ought we to conduct ourselves in this way?' and thus imparting to the rule 'validity' (obligatory power, binding character, capability of imposing duties)". This, according to Kantorowicz (1958, p. 24-25), "presupposes a *basic and absolute rule* on which the validity of all other rules depends and which therefore can no more be questioned, lest every rule should break down…":

> "…the commands of the lowest authority must be recognized as depending ultimately on the command of some supreme authority which we are absolutely obliged to obey; and, likewise, the precepts of our conscience must be acknowledged to depend on some *summum bonum*[208] which we are absolutely obliged to attempt to actualize. It is here that the inescapable religious implications of every social system become dimly visible".

He said that "every duty is subservient" to "the ideal of a supreme value, the *summum bonum*" (Kantorowicz, 1958, p. 30) and there is a "basic duty to actualize the supreme value (or rather…one of the supreme values[209])" (Kantorowicz, 1958, p. 31).

[208] Highest good.

[209] As one reviewer noticed, "Kantorowicz does not indicate what these values are" (Golding, 1959, p. 712).

How legal rules can be "distinguish[ed]" from moral rules was considered by Kantorowicz (1958, p. 41-44) in his 1939 essay. We are "bound", he said, to define moral rules "as a distinctive body of rules…if for no other reason than for the sake of analyzing those tragical conflicts in the history of states and churches in which the same act has been felt to be legal but immoral, or moral but illegal" (Kantorowicz, 1958, p. 42). The "distinction" between law and morality, according to Kantorowicz (1958, p. 43-44), is that law is "concerned with *external* conduct" while morality has to do with "*internal*" conduct[210]: "…all the various ethical systems *prescribe* internal conduct consisting of volitions, and deem the resulting inner attitude virtuous (as for instance pride or meekness, pugnacity or peacefulness, self-assertion or self-abnegation), whereas the rule of law never *prescribes* internal conduct, either good faith, due care, or the will to forbear from committing a crime, from having a guilty mind, from bearing malice or from being negligent". "The law may prescribe that the borrower of a thing, where it is borrowed both in the interest of the borrower and the lender, must show the care shown in his own affairs; but this does not threaten any sanctions however careless he be in mind, provided he does not in fact cause damage to the thing by *external acts* such as he would be careful to avoid in his own affairs" (Kantorowicz, 1958, p. 44). Kantorowicz (1958, p. 49) identified a "phenomenon" he termed "quasi-morality":

> "By this word we mean a purely external conduct which as to its content complies with moral rules and which therefore would be moral if it were dictated by a good motive. If, for instance, a rich man is obliging to his neighbours, fair to his competitors, helpful to his friends, generous to charities, he may be considered a valuable citizen, even if it be known that his behaviour is dictated purely by calculation, or fear of reproach, or vanity, or even a desire to fill others with envy".

[210] Kantorowicz (1958, p. 49) said that "Kant's theory that law, as opposed to morals, requires nothing but 'legality', i.e. mere conformity of external conduct with the law regardless of the underlying motive, is correct…"; Kant did not, however, refer to conformity with "the law" but to conformity with "the moral law (*das moralische Gesetz*)" (Kant, 1908, p. 72). Are they equivalent? "In *Kritik der praktischen Vernunft* (1788) Kant wrote: "What is essential in all moral worth (*Werths*) of actions is that the moral law must determine the will directly. If the determination of the will, although occurring in conformity with the moral law…does not occur on account of the law, then the action will indeed contain legality (*Legalität*), but not morality (*Moralität*)" (Kant, 1908, p. 72; 2002, p. 94). According to Marcus Willaschek, professor of modern philosophy at the University of Frankfurt am Main, "Kant here uses the terms 'legality' and 'morality' to express the same distinction that already played an important role in the *Groundwork* [*Grundlegung zur Metaphysik der Sitten* (1785)] between acting 'in conformity with duty' (*pflichtmäßig*) and acting 'from duty' (*aus Pflicht*)" (Willaschek, 1997, p. 209). Is this necessarily a duty to obey *statutes*?

His view was that "quasi-morality is all that can be achieved by social reform, practical politics and the pressure of public opinion…"[211] (Kantorowicz, 1958, p. 49-50). He understood that "what the law really prescribes is... nothing but external conduct, i.e. certain movements of the human body, its limbs, muscles, organs of speech, etc., or the forbearance from performing such movements" (Kantorowicz, 1958, p. 46-47):

> "All systems of morals, those preached as well as those practiced, whether religious or secular in origin, however indifferent in form and substance, require some kind of motive causing, or at least some kind of consciousness accompanying, the prescribed acts, or even treat this internal conduct as sufficient without requiring any kind of external manifestation of the will. But in law a person may act from the meanest, or at least from a purely selfish, motive and yet comply with his legal duties".

A rule of morality can "become legal, at the price, however, of losing its characteristic internality" (Kantorowicz, 1958, p. 45).

"Law is not the only rule of external human conduct" (Kantorowicz, 1928, p. 689). Conventions (*Sitte*) are "rules prescribing external conduct". A convention "may prescribe the expression of one's deference to, or affection for, the recipient of a letter by the style of address and salutation, but it goes no farther than enjoining the formal expression and does not prescribe the harboring of these feelings…" (Kantorowicz, 1958, p. 54). The "externality" of conventions "is so universally recognized that there can be no conflict with the moral duty of sincerity" (Kantorowicz, 1958, p. 54). In his 1939 essay Kantorowicz (1958, p. 52) listed the following examples of conventions (*Sitten*): the rules "concerning (a) good manners (at table, in the street, in paying visits, in speaking with parents, superiors, strangers, guests); (b) the occasions for and the appropriateness of gifts; (c) forms of greeting and styles of address; (d) topics of conversation; (e) forms of letter-writing; (f) court and professional etiquette; (g) tact; (h) behaviour at ceremonies; (i) cleanliness of clothes; (j) degree of liberty allowed in social intercourse of the sexes; (k) comity of nations, and so on". The importance of conventions is "enormous", he believed (Kantorowicz, 1958, p. 54-55): "…we are ruled by them at every step from the cradle to the grave, and they are enforced with greater efficiency than the rules of law (to say nothing of the rules of morals)…". He claimed that "many, perhaps most,

[211] He conceded that it is possible that "genuine morality may follow" in the "wake" of quasi-morality "through the familiar process whereby internal conduct is, at the bidding of self-respect, adjusted to external conduct" (Kantorowicz, 1958, p. 49-50).

people…would more readily commit a minor offence against the law, for instance a breach of traffic regulations, than a social *faux pas*, such as wearing the far more tasteful clothes of their great-grandfathers". There are "probably" three reasons for this "phenomenon": (a) the "infringements" of conventions (*Sitten*) "are nearly always patent, those of law, particularly of criminal law, often remain secret and are therefore less exposed to instantaneous sanctions than the former"; (b) "the sanctions protecting" conventions "are often of a particularly dreaded kind, such as ridicule, contempt, ostracism (even in cases of minor importance)"; and, (c) conventions are "less technical and therefore better known than law. All this has been true at all times…" (Kantorowicz, 1958, p. 54-55). "The difference" between laws and conventions has "often been sought in coercion", he noted, but he said that "this is doubly false" because conventions (*Sitten*) "can always be enforced and law sometimes cannot..." (Kantorowicz, 1928, p. 689). "Another definition, which proclaims law" – but not conventions – "as the command of the state, is equally worthless, because it would exclude phenomena like…international law, and customary law". "The true distinction", Kantorowicz (1928, p. 690) wrote, "lies in their justiciability, that is, the propriety of [their] application by a judge". A "judge" is "an authoritative person who decides individual cases of controversy or doubt by consciously applying general rules of procedure and of decision, or at least, proceeding and deciding (*de facto*) according to such rules". Conventions are not "fitted" to be applied by a judge "because the person who would try to do so, would become ridiculous, in some cases even despicable, and so would lose authority". "It is true", Kantrorowicz (1928, p. 690-691) continued, that if the "criterion" of "justiciability" is adopted "we ought to regard as law certain rules which have heretofore been regarded as merely customary, especially all rules applied by umpires, arbitrators and other quasi-judicial persons, e.g., commercial usages, rules of play and sport, rites of dueling, etc.". This, he said, is "no objection, as the logical structure, the scientific treatment and the social development of these rules are quite similar to those rules which have always been called rules of law and therefore ought to be included in the same concept":

> "This, of course, does not imply that they are binding on the official judge in the same way as the law of the state, or that they are binding on him at all. But the fruitfulness of our broader conception of the law will be shown by the fact that it enables us to embrace all the different forms of rules which are necessary for the decision of justiciable cases, whether through state-appointed judges, or otherwise".

"Law", according to Kantorowicz (1928, p. 692), "is either formal law, i.e., law having undergone and completed a definite process of formation or integration[212], or 'free law', i.e., law which has not completed these processes"[213]. "Formal law is, in major part, of state character, free law is, on the contrary, in the greater part, non-state" (Kantorowicz, 1934a, p.232). Free law was divided by Kantorowicz (1928, p. 693) in his 1927 seminar into *nascent law* and *desired law*. Nascent law is law which "would be formal law, if it had undergone and completed the process of formation, instead of only having entered into it" and desired law is "law which those who apply it desire to become formal law". Both types of free law – nascent law and desired law – can be either "explicit law" or "implicit law". There are, consequently, six "forms" of law according to Kantorowicz's 1927/1928 schema (1928, p. 692-697):

A 1	Formal explicit law
A 2	Formal implicit law[214]
B 1a	Nascent explicit law
B 1b	Nascent implicit law
B 2a	Desired explicit law
B 2b	Desired implicit law

All six forms of law, Kantorowicz (1928, p. 693) wrote, are "required" because of "the necessity of possessing a rule of law for the decision of any imaginable case which, on account of the incompleteness of the existing formal law, would be impossible, if the rules of free law could not be applied". They are also "required" to "solve" a "problem": "on the one hand, it cannot be honestly denied that very often…judges create new formal law, and that, on the other hand, one could not accept the view that the decided case was governed, before the decision of the judge, by no law at all, or by a contrary formal law". "This problem is solved, if we recognize that such cases were governed by free law" (Kantorowicz, 1928, p. 694).

[212] Described in a later work as a "process of historical formation (*le processus de formation historique*)" (Kantorowicz, 1934a, p.232).

[213] Free law, Kantorowicz (1928, p. 692) observed, is "of infinitely greater practical importance than formal law" because litigation is "generally superfluous if the case in question is really determined by genuine formal law".

[214] He defined "formal implicit law" as "customary law in its usual sense" (Kantorowicz, 1928, p. 692).

Nascent explicit law (*B* 1a), nascent implicit law (*B* 1b), desired explicit law (*B* 2a) and desired implicit law (*B* 2b) are the four "forms" of "free law" in Kantorowicz's 1927/1928 schema. He provided "examples" of each of those forms (Kantorowicz, 1928, p. 694-697):

> "*Nascent explicit law* (*B* 1a) includes:
>
> i. The rules which, as may be concluded from the preparatory stages (motivations, debates, etc.) of the statute, would be the actual statute, if the question at issue had not been left undecided, but had been decided by the actual legislative body. …
>
> ii. Statutes which have been published but not yet come into force…".

> "*Nascent implicit law* (*B* 1b) includes:
>
> i. The rules implicit in business practices and other usages which either are too recent to have become *inveterata consuetudo*[215], or are still lacking *opinio juris*[216], and only gradually differentiate themselves from mere rules of decency or policy, or from habits;
>
> ii. The rules to which statutes and judicial decisions allude if they speak of '*boni mores*'[217], the 'habits of a *bonus pater familias*'[218], 'good faith and trust', 'nature of things', 'exigencies of life', 'equity' (if not recognized as a part of the

[215] Inveterate use. Kantorowicz (1928, p. 693) construes this as "long or frequent usage".

[216] According to Kantorowicz (1928, p. 693) *opinio juris* is "the conviction that a customary rule is fitted for being applied in a court of law". Kunz (1953, p. 667) defined *opinio juris* as the "conviction" that a "practice" is "legally binding".

[217] Literally, "good morals" (Horan, 1976, p. 861; Harbottle, 1897, p. 214).

[218] A "good father of a family" (Jovanović & Todorović, 2007, p. 536); in French, a « *bon père de famille* » (Jovanović & Todorović, 2007, p. 893). This is a norm taken from Roman law and used in civil law systems. "Acting contrary to what a *bonus pater familias* would do in a given situation may serve as a basis for measuring" one's "culpability and liability in a specific case" (Berger, 1953, p. 377). See for example Article 589 of the Civil Code of the Philippines: "The usufructuary shall take care of the things given in usufruct as a good father of a family". See also Article 1173 paragraph 2 ("If the law or contract does not state the diligence which is to be observed in the performance [of an obligation], that which is expected of a good father of a family shall be required") and Articles 1163, 1761, 1763, 1885, 1887, 2008, 2099, 2145, 2180 and 2203 of the Civil Code of the Philippines: www.gov.ph/downloads/1949/06jun/19490618-RA-0386-JPL.pdf (Cf. Articles 270, 497, 1094, 1104, 1555, 1719, 1788, 1801, 1867, 1889 and 1903 of the Spanish Civil Code: http://www.boe.es/buscar/act.php?id=BOE-A-1889-4763)

formal law), 'justice', 'public convenience', etc. These concepts are mere standards (*Blankettbegriffe*)[219], which cannot be applied before having been filled up by substantive rules;

iii. Rules implied in notions of degree like 'excessive speed' (in motor vehicle legislation), 'undue influence', 'moderate correction' (of a child), 'negligence', etc.".

"*Desired explicit law* (*B* 2a) includes:

i. The rule which according to Article 1 of the…Swiss Civil Code of 1907 the judge would enact, if neither the Code nor customary law contained a provision, and if he himself were the legislator;

ii. …interpretations which feign to be mere declarations of the statute, but, as is nearly always the case, cannot be strictly deduced from it and in fact are nothing but the statute as the interpreter desires it to be".

"*Desired implicit law* (*B* 2b) includes:

i. …those interpretations which the interpreting jurist desires to become formal implicit law through judicial practice;

ii. The rule on which a judicial precedent (in the continental sense) is based and which the continental judge desires other courts of higher, equal, or lower jurisdiction to follow (although he cannot force them to do so) and so gradually to become formal customary law (judicial usage);

iii. The rules of quantitative evaluation according to which a penal sentence is imposed on an offender whenever the law merely fixes the maximum and the minimum penalties".

"The bulk" of what are presented as "interpretations" of the codes in civil-law legal systems Kantorowicz (1928, p. 698) regarded as "desired explicit law in disguise" and the "bulk" of what in common-law legal systems is "deemed…mere application of established case-law" as "desired implicit law in disguise".

[219] Blank concepts. These are "frequently elusive concepts containing broad, or even vague, principles to be filled and refined on a case-by-case basis by the courts, and by those other public authorities applying legislation" (OECD, 1999, p. 9). *Gute Sitten* and *Treu und Glauben* are examples of blank concepts (von Hippel, 1967, p. 610).

Kantorowicz revised his 1927/1928 schema in 1934. There is, he wrote in *Rapport sur les sources du droit positif*[220], "a pluralism of forms of law (*un pluralisme des formes du droit*) of which this is the schema (*schéma*)" (Kantorowicz, 1934a, p.232-233):

I. FORMAL LAW

1. "Formal statutory law, namely:
   a) Statute;
   b) Decree (in the traditional sense);
   c) Case-law in the Anglo-American sense (judicial precedent).
2. Formal customary law, that is to say customary law in the traditional sense.

Formal statutory law is formed by the legislative process, the decree or the judicial precedent and, in all of these stages, by the official definition of its text and of its mode of publication.

Formal customary law is formed by *longaeva*[221] *consuetudo*[222] and *opinio juris*.

II. FREE LAW is divided into:

1. Conditioned law (*droit conditionné*), that is to say, law that would be formal if the process of its formation had been led to conclusion, and into
2. Desired law, that is to say, law which those who apply it desire to become formal.

Each of these categories of free law is itself divided into:

a) Statutory law and into
b) Customary law[223]".

[220] Report on the sources of positive law.

[221] The Latin adjective *longaevus* is translatable as "of great age, aged, ancient" (Smith, 1855, p.646). Kantorowicz (1928, p.693) had used a different adjective – inveterate (*inveterata*) – in the summary published in the *Columbia Law Review* in 1928 of his seminar in 1927 on "Theory of Judicial Decisions".

[222] In this sense, "use" (Smith, 1855, p.242).

[223] "…the old division between statutory and customary law continues to assert itself" (Kantorowicz, 1934a, p. 232).

The six different forms of law according to the 1934 schema are therefore as follows:

I. 1.	Formal statutory law (*droit formel statutaire*)
I. 2.	Formal customary law (*droit formel coutumier*)
II. 1. *a.*	Free statutory law, conditioned (*droit statutaire libre, conditionné*)
II. 1. *b.*	Free customary law, conditioned (*droit coutumier libre, conditionné*)
II. 2. *a.*	Free statutory law, desired (*droit statutaire libre, désiré*)
II. 2. *b.*	Free customary law, desired (*droit coutumier libre, désiré*)

"*Examples* of" the four forms of free law were provided by Kantorowicz (1934a, p. 233):

> "II. 1. *a.* (Free statutory law, conditioned): the rule that, after the completion of the preparatory work, would be currently a statute (*loi*) if it were voted on...., then, the statute published but not yet in force, as well as the real rules as opposed to those resulting from drafting errors".
>
> "II. 1. *b.* (Free customary law, conditioned): the rules corresponding to mores of trade, to good faith, to the nature of things (*la nature des choses*), to good morals (*bonnes mœurs*), to necessities of commerce, to equity, etc.".
>
> "II. 2. *a.* (Free statutory law, desired): the rule that the judge, in virtue, for example of the first article of the Swiss Civil Code, would establish in the absence of a legislative or customary disposition; then, …the conclusions that one gives to interpretations but which do not ensue from the statute according to strict logic; lastly, value judgements (*jugements de valeurs*) and volitional decisions (*décisions de volonté*)".
>
> "II. 2. *b.* (Free customary law, desired): …the rules that establish, within a certain sanction, the estimation of the punishment; lastly, the rule on which is founded the value of judicial precedent (in the continental sense of the word)".

"It is necessary to elaborate a strict hierarchy of the respective validity" of the six different forms of law, Kantorowicz (1934a, p. 233) wrote. He explained that this is a hierarchy "in the constructive sense, which has nothing to do with hierarchy in the empirical or normative sense". "In this hierarchy, the gaps of the superior form are always filled by the rules appertaining to the

immediately inferior form of law". "Without such a hierarchy, the problem of competition between juridical forms...would become insoluble". "The criterion is the degree to which the form of law in question meets the formal demands which must be made of any legal rule, namely: security, stability, equality, impersonality, logicality, certainty and authority" (Kantorowicz, 1934a, p. 234). "In the modern rational state, all formal law has priority over free law. Within free law, conditioned law (*droit conditionné*) has priority over desired law and, as much in formal law as in free law, statutory law comes before customary law". Formal law "has incontestable primacy…" (Kantorowicz, 1934a, p. 234). In his 1927 seminar he said that the "order" of the different forms of free law "is determined in part by positive rules, in part by considerations of legal philosophy" (Kantorowicz, 1928, p. 704):

> "The different forms of law follow, as regards their respective validity, in the same order in which they correspond to the ideals of the form of the law: certainty, stability, equality, objectivity, consistency, precision, and authority. Therefore, formal law has precedence over free law; among the forms of the latter nascent law has precedence over desired law, and within these two groups, explicit law has precedence over implicit law, always on the foregoing grounds. The result is a six-fold graduation in which every grade serves solely to fill up the gaps of the next higher grade"[224].

Kantorowicz (1928, p. 692) described formal law as "law" that has "undergone and completed a definite process of formation and integration". Formal law can be either "*explicit law* (gesetztes Recht[225]), i.e., a rule which has been explicitly declared to be law, or *implicit law*, i.e., a rule which is recognizable as law by significant actions (*concludente Handlungen*[226])". He defined formal implicit law as "customary law in its usual sense" (Kantorowicz, 1928, p. 692).

[224] "The greatest practical difference between this theory and the prevailing practice is that the present practice in its unconscious subjectivism places the interpretative rules on the same level with the statute and therefore in the first grade, while we, recognizing these rules to be nothing but desired explicit law, shift them to the fifth place" (Kantorowicz, 1928, p. 704).

[225] Posited law.

[226] In Italian the word *concludente* means "concludent, decisive" (James & Grassi, 1854, p. 86). Concludent is defined in the *Oxford English Dictionary* as "conclusive, decisive, convincing". *Handlungen*, a German word, can be translated as actions, acts or deeds.

"Formal explicit law"[227], as defined by Kantorowicz in his 1927/1928 schema, comprises:

(a) "Statutes, resting on original legislative authority";

(b) "Orders in Council, rules of court, by-laws, ordinances, regulations, etc., resting on delegated legislative authority"; and,

(c) "Case-law, or judge-made law…"[228].

The formal explicit law of the Union, according to this definition, is the Treaty on European Union, the Treaty on the Functioning of the European Union, the Charter of Fundamental Rights of the European Union, the binding legal acts (*verbindliche Rechtsakte*) of the Union[229] and the case-law of the Court of Justice of the European Union. "Formal implicit law" was characterized by Kantorowicz (1928, p. 692) as "customary law in its usual sense". "Formal customary law", he explained, "is formed…through long or frequent usage (*inveterata consuetudo*), to which is added *opinio juris*, i.e., the conviction that a customary rule is fitted for being applied in a court of law" (Kanotorowicz, 1928, p. 692-693). This "usage is…always shaped and developed by judges…and other lawyers (…*Juristenrecht*[230])"; it is "never a mere popular practice, as was formerly believed (*Volksrecht*[231])" (Kantorowicz, 1928, p. 692-693). "Case-law, or judge-made law" was, significantly, included by Kantorowicz (1928, p. 692) in his definition of "formal explicit law".

"In reality, state-made law is only one of the many forms of law obtaining in a state….", Kantorowicz (1958, p. 86) asserted. It "must be acknowledged", he said, "that the formal law is subject to gaps and that these gaps must be filled up by free law…" (Kantorowicz, 1928, p. 701). "Out of free law finally (*endlich*)" the gaps in the statute (*Gesetz*) "must be filled (*ausgefüllt*)", he had written in *Der Kampf um die Rechtswissenschaft* (1906) (Kantorowicz,

[227] "The process of formation or integration of formal explicit law varies according to its different forms and the positive law of the respective country. It embraces the process of legislation (including the deliberation, debating, voting, sanctioning, publication and coming into force of the statute), the issuing and publication of the ordinance, the promulgation of the precedent and its reception in an official or unofficial collection of reports, etc." (Kantorowicz, 1928, p. 692).

[228] "This form of formal law is peculiar to some systems…and is by the judges themselves generally but erroneously treated as declaratory (i.e., 'implicit') law" (Kantorowicz, 1928, p. 692).

[229] Regulations, directives and decisions (OJ C 83, 30.3.2010, p. 171-172).

[230] Jurists' law.

[231] Law of the people/popular law.

1906, p. 14). There is a "material gap" in the formal law if the legal rule "itself is lacking"; there is a textual gap" if "there is lacking only an adequate textual expression" of the "purpose" of the legal rule (Kantorowicz, 1928, p. 701-702). "The textual gaps must…be filled up by 'free interpretation', i.e., an interpretation which, by understanding the law in a broader or in a narrower sense (the broader sense including the process of analogy), adapts the law to its own purpose" (Kantorowicz, 1928, p. 702-703):

> "This purpose must not be identified with the subjective intentions of the legislator, nor with the interests which are protected by the law, nor with the abstract principle governing the respective rule of law. The purpose must be found in the present social effects of the application of the rule in so far as they are desirable, i.e., as they would justify the making of that rule today. This of course cannot be ascertained without sociological, economic, psychological, etc., reflections and investigations".

Free interpretation "implies the conception that judges are creative organs of the laws's development…" (Kantorowicz, 1937, p. 325). When "the purpose of the law is neglected in favour of the historical intention that was the root of the law, or in favour of its literal sense…", we are "faced with" two "aberrations of legal science, which are the contrary of free interpretation" (Kantorowicz, 1928, p. 703):

> "Either the pseudo-historical interpretation, (as distinguished from the genuine historical investigation which does not confuse the historical roots of the rule with its present object), or the literal interpretation. The literal interpretation is either (1) a mechanical one, if the purpose is not even taken into account, or (2) a tendential one, if the interpreter feigns to base his interpretation on the letter of the law, but in reality either carries through the purpose without acknowledging it, or represses it and substitutes another purpose (*Zweckblinde*[232], *Zweckverschleiernde*[233], *Zweckverfälschende*[234])".

[232] Purpose-blind.

[233] Purpose-veiling.

[234] Purpose-falsifying.

Textual gaps in the formal law "must…be filled up by 'free interpretation' " but "material gaps… have to be filled up by the different forms of…free law".

"The formation and application of free law is the object of the *freie Rechtsfindung* [free law-finding]", Kantorowicz (1928, p. 704) said in his 1927 seminar. "The formation of nascent law presupposes the knowledge of recent history of law and of present social conditions, as well as the usage of precedents in countries where they [i.e., precedents] do not belong to the formal law" (Kantorowicz, 1928, p. 705). "Here again the aid of sociological studies and concepts comes in", he said. "The formation of desired law is controlled by 'juristic relativism' which applies especially to the formation of desired explicit law and means that, where different interpretations of the statute are possible, all of them, in so far as they are compatible with the purpose of the statute, have to be systematically collected and then alternatively applied: one time, one interpretation and another time, the other interpretation, according as the one or the other allows the realization of the purpose of the statute" (Kantorowicz, 1928, p. 705). "If this purpose cannot be ascertained, then the judicial [*sic*] ideal of the interpreter takes its place".

The "distinction between judges making the law *praeter*, and those making it *contra*, *legem*" is "all-important", Kantorowicz (1934c, p. 188) wrote in a review published following the National Socialist takeover of power (*Machtübernahme*) in Germany in 1933. National Socialism "entirely made its own the thoughts of the free law movement…no longer merely to supplement, *intra legem*[235] and *praeter legem*[236], statutes having gaps (*lückenhafter Gesetze*) but, what the free law movement had been wrongly reproached for, also *contra legem*[237]", Gustav Radbruch (1990, p. 196) said in *Vorschule der Rechtsphilosophie* (1948).

Kantorowicz (1911b, p. 258-263) wrote an article to refute *Die Contra-legem-Fabel* – "the widespread fable" that the free law jurists "disputed the binding nature of statutes, want[ed] to permit…judges to pass judgement *contra legem*" and that that was "the kernel (*Kern*) of the desired innovations" (Kantorowicz, 1911a, p. 285). "It is alleged", Kantorowicz wrote in this article published in the *Deutsche Richterzeitung* on 15 April 1911, "that the free law jurists – or their (supposedly existing) 'radical wing' – contested the unconditional obligatoriness of the statute and would allow the judge – be it on principle, be it in case of necessity – *to decide contrary to the statute*. But this allegation…is a *fable*". "I call it for the sake of brevity the *contra legem fable* (Contra-legem-Fabel)…", Kantorowicz (1911b, c. 259) wrote. He said that

[235] Within the statute.

[236] Alongside the statute.

[237] Contrary to the statute.

"*only* ***subsidiary*** *validity*" had been "*claimed…for 'free law-finding'* and 'free law' " (Kantorowicz, 1911b, c. 262-263) (emphasis in original). "The former [i.e., free law-finding (*freie Rechtsfinding*)] has its place precisely where mere interpretation has reached its limits; the latter [i.e., free law (*freie law*)] where gaps in statutes (*Lücken des Gesetzes*) are to be filled".

A revised edition of *Der Kampf um die Rechtswissenschaft* was published in Italian in 1908[238]. Kantorowicz wrote himself in the Italian language the revised sections and in a letter of 4 June 1907 told Gustav Radbruch: "I have significantly altered the question of the judge in the translation; made it milder and better!" (Carter, 2005, p. 685). In this revised edition Kantorowicz "stressed that the judge's decision must be *praeter legem* and not *contra legem*" (Carter, 2005, p. 685). "I have noticed that many criticisms of my work and of its friends, claim we want to place the judge above the statute (*porre il giudice di sopra la legge*)", Kantorowicz (1908a, p. 22) said in a letter[239] to Raffaele Majetti (31.10.1860 – 9.4.1930), the Italian translator of *Der Kampf um die Rechtswissenschaft*:

> "Please, therefore, persist in affirming that none of us supports (*propugna*) such a thesis: that we, absolutely, are not revolutionaries: we want, only, to determine what in reality happens, and render the judge conscious – whereas today he is unconscious – of the creativeness of his juridical activities (*della creatrice sua attivita giuridica*): and this methodically (*metodicamente*) to render perfect, but *praeter*[240] not *contra legem*!".

Kantorowicz omitted from the revised edition the following passage in *Der Kampf um die Rechtswissenschaft* (Kantorowicz, 1906, p. 41):

> "We…demand that the judge…decide according to the clear wording of the statute as much of the case as can be decided. From this he may and should refrain, firstly, as soon as the statute does not seem to offer him an undoubted decision; secondly, if, according to his free and conscientious conviction, it is

[238] *La lotta per la scienza del diritto. Edizione italiana dalla tedesca, riveduta dall'autore con prefazione e note del giudice R. Majetti*.
The struggle for legal science. Italian edition of the German, revised by the author with a preface and notes by judge R. Majetti.

[239] The letter was written in Italian and was quoted by Majetti in his preface to the Italian edition.

[240] Alongside. See Key (1888, p. 459-460) for all of the possible translations and senses of the preposition and adverb *praetor*.

> not probable (*wahrscheinlich*) that the state authority in being at the time of the decision would have made the decision the statute requires. In both cases he should make the decision which, according to his conviction, the present state authority (*Staatsgewalt*) would have made if it had had in mind the particular case. If he is unable to establish such a conviction, he should decide according to free law. Finally, in desperately complicated or only quantitatively-questionable cases, such as compensation for immaterial harm, he should – and must – decide according to his pleasure (*nach Willkür*)".

Kantorowicz (1911b, c. 262) quoted in his article on *Die Contra-legem-Fabel* the first sentence of that passage but he claimed: "What follows *solely* concerns the case that is missing (*fehlt*) a 'clear wording'; the statute thus leaves the judge in the lurch".

In *Der Kampf um die Rechtswissenschaft* Kantorowicz famously described "the prevailing idealized image of the jurist" (Kantorowicz, 1906, p. 7):

> "A higher state official with academic training, he sits, armed merely with a thinking machine, though one of the finest type, in his cell. Its only furniture is a green desk, on which the state code is before him. Give him any case, one real or just imagined, and in accordance with his duty, he is able, with the help of purely logical operations and a secret technique only he understands, to demonstrate[241] (*nachzuweisen*) the predetermined decision of the legislature with absolute precision".

Kantorowicz (1937, p. 324) argued, however, that "every legal concept is vague and lends itself to various constructions" and "every legal rule, no matter whether embodied in decisions or statutes, permits various interpretations…":

[241] "In the sense of "[t]o point out, indicate; to exhibit, set forth", to quote the definition of the verb "demonstrate" in the *Oxford English Dictionary*.

> "...those constructions and these interpretations must be determined by the social, economic, and political conditions from which we can infer the objective purposes of the law (which ought not to be confused with the subjective intents of individual legislators). These purposes alone bind the courts. Therefore, as these conditions change, the application of the law must change correspondingly. The cases presenting themselves under the changed conditions are not similar to the cases decided, and the rule of *stare decisis* does not apply to them".

In "several" Swiss cantons judges are directly elected by the people (Fleiner, 2006, p. 115; Venice Commission, 2007, p. 3) and one of the representatives of the free law movement, Theodor Sternberg, proposed in 1906 the "popular election of judges perhaps according to the Swiss model (*Volkswahl der Richter etwa nach schweizerischem Vorbild*)" (Carter, 2005, p. 721; Kantorowicz, 1906, p. 46). Sternberg added this suggestion to "the paragraph on the impartiality and independence of judges" in the manuscript of Kantorowicz's *Der Kampf um die Rechtswissenschaft* (1906) (Carter, 2005, p. 671) but Kantorowicz omitted it from the revised (Italian) edition published in 1908. Joseph Unger (2.7.1828 – 2.5.1913), the President of the Austrian *Reichsgericht*, commented on the suggestion in an article published in the *Deutsche Juristen-Zeitung* on 15 July 1906. He said that elected judges would be "compliant organs of political and social parties and would exercise their high office on a partisan basis" (Unger, 1906, c. 784). Is this what they are and how they exercise their office in the Swiss cantons of Basel-Stadt, Geneva and Uri? [242]

"The selection procedures for judges are...very pertinent" in respect of their independence, the President of the Court of Justice, Vassilios Skouris, said in a speech on 21 November 2013 (p. 1). The Court of Justice consists of "one judge from each member state". That judge is nominated by the Government of the member state, "appointed by common accord" of the Governments of the member states[243] and can be appointed even if the panel set up pursuant to Article 255 paragraph 1of the Treaty on the Functioning of the European Union has given a unfavourable opinion on his or her suitability[244]. That panel has decided that "its opinions are

[242] "All judges" in the Canton of Basel-Stadt, Canton of Geneva and Canton of Uri "are elected by the people" (Präsidialdepartement des Kantons Basel-Stadt, 2011; Bonjour, 1920, p. 156; Kiener, 2012, p. 414).

[243] See Article 253 paragraph 1 of the Treaty on the Functioning of the European Union (OJ C 83, 30.3.2010, p. 158).

[244] The panel "does not have a power of veto…" (Shetreet & Turenne, 2013, p. 152).

intended exclusively" for the Governments of the member states and that the "positions it takes on the suitability" of nominees "may not be disclosed to the public, either directly or indirectly" (Sauvé et al., 2013, p. 16). "The panel's analysis" of Regulation (EC) No. 1049/2001 of 30 May 2001 regarding public access to European Parliament, Council and Commission documents and Regulation (EC) No. 45/2001 of 18 December 2000 on the protection of individuals with regard to the processing of personal data by the Community institutions and bodies and on the free movement of such data, "as interpreted by the Court of Justice" in its judgement of 29 June 2010 in Case Case C‑28/08 P European Commission v. The Bavarian Lager Co. Ltd [2010] ECR I-6055, "leads it to" the view that "the content of the opinions it gives, whether favourable or not, may not be made public either directly or even, through statistical details, indirectly", the panel said in the report it sent to the Council of the European Union on 11 February 2011 of its activities in 2010 (Council of the European Union, 2011, p. 3). And yet in their decision appointing Ms Alexandra Prechal "judge to the Court of Justice for the period from 10 June 2010 to 6 October 2012" the representatives of the Governments of the member states expressly said that the panel set up pursuant to Article 255 paragraph 1 of the Treaty on the Functioning of the European Union "has given a favourable opinion on the suitability of Ms Alexandra Prechal to perform the duties of Judge of the Court of Justice" (Council of the European Union, 2010, p. 2-3)!

There is no evidence that judges appointed in accordance with this nomination and appointment process and similar nomination and appointment processes are more suitable to perform the duties of a judge than judges elected "according to the Swiss model".

Free law-finding (freie Rechtsfindung)
Eugen Ehrlich (14.9.1862 – 2.5.1922)

An obituary published in the *Neue Freie Presse* newspaper in Vienna on 3 May 1922 described Eugen Ehrlich (14.9.1862 – 2.5.1922) as "the founder of the free law movement"[245] (Neue Freie Presse, 1922, p. 7). His theory of free law-finding (*freie Rechtsfindung*) is briefly discussed in this section. Ehrlich (1913, p. 237) believed that the "English case-law system" is "grounded on" free law-finding (*die freie Rechtsfindung gegründete englische Case-Law-System*). He considered "the English legal system (*des englischen Rechtssystems*)…the legal system…based on" free law-finding (*dem darauf beruhenden Rechtssystem*) (Ehrlich, 1913, p. 237). He understood the "task" of the judge in the English legal system to be "to find a fair decision adapted to the circumstances of the individual case" (Ehrlich, 1903 p. 1). "In doing so the judge is of course bound by statutory law, customary law, tradition (*Ueberlieferung*) and principles expressed in previous decisions, all this is however not viewed as the basis (*Grundlage*) of the decision, but rather as the limit to which the freedom of the judge reaches".

"Free law-finding is not", he insisted, "a law-finding that is free of (*vom*) statutes (*Gesetze*)…" (Ehrlich, 1913, p. 274; 1936, p. 340). Ehrlich (1903, p. 21; 1917a, p. 65) believed that it "should only occur when a clear rule is not contained in the applicable laws".

"The legislature can in statutes decide only the legal cases it surveys (*übersicht*), consequently one can take from the statutes no decisions of legal cases about which the legislature has not thought and has not been able to think" (Ehrlich, 1922a, p. 15; 1922b, p. 140). "A case that is not foreseen in any statutes, that resembles none of the hitherto decided cases, so that it lets itself be brought under no known decision or generalization, therefore obviously falls into the 'law-empty space' (*'rechtsleeren Raum'*); statutes and juridical tradition probably offer for its decision a certain instruction, a scientific basis, but the decision itself must be found freely" (Ehrlich, 1903, p. 3).

"A just decision of a judge" is "one which correctly appreciates the interests involved in the dispute, furthers the interests that deserve societal protection, and harms as little as possible other important interests" (Ehrlich, 1917c, p. 433).

[245] „*Er ist der Begründer der Freirechtsbewegung...*".

"When it is required of jurists that they independently draw the boundary-line between conflicting interests" this implies "that they have to draw it in accordance with justice (*nach Gerechtigkeit*)" (Ehrlich, 1913, p. 161; 1936, p. 200). "The decision in accordance with justice is a decision for reasons that also affect (*wirken auf*) the uninvolved: it is a decision of the uninvolved in this opposition of interests (*Interessengegensatz*), or, if it is effected by one of the involved, a decision that the uninvolved would also make or approve" (Ehrlich, 1913, p. 162; 1936, p. 200).

Ehrlich's theory of free law-finding has been wrongly disassociated from his conception of law. "A large part of the law (*des Rechts*) undoubtedly arises directly in society…", he wrote in 1920. "Another part of the law (*des Recht*) however arises first in…legal propositions (*Rechtssätze*)…" (Ehrlich, 1920, p. 3). "The legal proposition (*Rechtssatz*) is the instruction composed in words to the courts, how they have to decide a legal case (decision norm [*Entscheidungsnorm*]) or to administrative officials, how they should proceed in a case (administrative norm [*Verwaltungsnorm*[246]])" (Ehrlich, 1922a, p. 3; 1922b, p. 132).

"In the form of the legal proposition, especially in the form of a statute (*Gesetz*), various (*verschiedenste*) content can be clothed (*gekleidet*). There are legal propositions (*Rechtssätze*) without any normative content, with non-binding statutory content, statutes in the formal sense. There are also legal propositions that do not yield (*geben*) legal norms, but societal norms (*Gesellschaftliche Normen*) of another type" (Ehrlich, 1913, p. 138; 1936, p. 171). The "purpose" of "legal propositions that contain legal norms…is to serve either as the basis for decisions of the courts or for direct interventions by the authorities (*unmittelbare behördliche Eingriffe*)". "The material-legal proposition (*materiellrechtliche Rechtssatz*), which contains a decision norm, indicates (*bezeichnet*) 1. above all the interest worthy of protection, 2. the presuppositions of its worthiness of protection, 3. the attack that is to be warded off, finally 4. the type and the extent of legal protection" (Ehrlich, 1917c, p. 312). "The legal proposition *must*…indicate the interest the protection of which…is intended, the particular presuppositions of legal protection, the type of attack and the particular means of protection" (emphasis added). In German legal science the "presuppositions of the worthiness of protection [of the interest] and the attack on the interest are summarized…as 'juridical facts' (*juristische Tatsachen*)". "The significance of juridical facts consists in that as a rule they alone are the subject of proof (*Beweis*) in proceedings" (Ehrlich, 1917c, p. 312). Ehrlich (1922a, p. 13) contended that "the great mass of legal propositions (*Rechtssätze*) are originated (*entstanden*) not through statutes (*Gesetze*), but in judge-made and jurists' law (*richterlichen und Juristenrecht*)". "Legal

[246] In 1913 he had used the compound word *Eingriffsnormen* – intervention norms (Ehrlich, 1913, p. 296).

propositions come out (*kommen auf*)…in judicial case-law and in jurisprudence (*Jurisprudenz*), as judge-made or as jurists' law (*als richterliches oder als Juristenrecht*)" (Ehrlich, 1922a, p. 9).

"The decision norm (*Entscheidungsnorm*), which contains the general proposition underlying the decision, thereby raises the claim to be a truth that should apply not merely in the case, about which it directly concerns, but in any identical or even any similar case" (Ehrlich, 1913, p. 106; 1936, p. 132). "The legal supremacy (*Rechtshoheit*) of the state in its territory so characteristic of modern law has its basis in the consistency of decision norms" (Ehrlich, 1913, p. 107; 1936, p. 133). Ehrlich (1922a, p. 6-7) defined the principle of the consistency of decision norms (*Grundsatz der Stetigkeit der Entscheidungsnormen*) as follows: "…any new legal case that is in some way similar to an older, will if possible be decided according to the same principles as that legal case". "When one nowadays usually believes *Rechtsgebiet*[247] and *Staatsgebiet*[248] are the same, the reason is simply that the courts in a state territory are in the habit of consistently adhering to certain decision norms" (Ehrlich, 1913, p. 107; 1936, p. 133). The consistency (*Stetigkeit*) of decision norms is "enormously important for legal development" (Ehrlich, 1913, p. 106; 1936, p. 132):

> "It is initially based on social psychology. If one were to find (*erkennen*) differently in identical or similar cases, this would not be law, but arbitrariness (*Willkür*) or caprice (*Laune*). It also corresponds to a certain economy in thought. The intellectual work that is undoubtedly always associated with the finding of decision norms is obviously saved if the verdict is according to already-found decision norms. Add to this too that a strong social need exists for consistent decision norms which permit at least to a limited extent the anticipation and the prediction of the decisions and make it possible for people to adapt themselves accordingly in advance".

"The consistency of the decision norms results in them stripping off (*abstreifen*) their original form and becoming legal propositions" (Ehrlich, 1913, p. 109; 1936, p. 135). Legal propositions are "predominantly…formed (*gebildet*)…on the basis of decision norms in the judgements of judges" (Ehrlich, 1913, p. 141; 1936, p. 175). "In order to form a legal proposition from the decision norms...the generally valid must be enucleated from them and expressed in an appropriate way. This intellectual labour, whoever may do it, is jurisprudence

[247] The domain of law.

[248] The domain of the state.

(*Jurisprudenz*)" (Ehrlich, 1913, p. 141; 1936, p. 175). "Every decision norm already contains the germ of a legal proposition. Reduced to the fundamental contained in it, expressed in words, authoritatively proclaimed with the claim to general validity, the decision norm becomes the legal proposition. This is true even when it only concretizes (*konkretisiert*) the concept already contained in a legal proposition" (Ehrlich, 1913, p. 140-141; 1936, p. 174).

A decision "according to a legal proposition is only possible when a legal proposition is already in existence" (Ehrlich, 1913, p. 139; 1936, p. 172). There are, in addition, "gaps in the legal propositions (*Lücken in den Rechtssätzen*)..." (Ehrlich, 1917b, p. 72). "The judge must…always himself find a decision norm (*Entscheidungsnorm*), whether he decides without a legal proposition or on the basis of a legal proposition; only in the second case is the decision norm of the judge determined by what is contained in the legal proposition, whereas in the first case is it found quite freely" (Ehrlich, 1913, p. 140; 1936, p. 173). "There are however legal propositions that leave the judge an almost unlimited freedom" (Ehrlich, 1913, p. 140; 1936, p. 174):

> "In private law legal propositions of this type include the legal propositions on the misuse of a right (*die Rechtsätze über den Mißbrauch eines Rechts*)…on faith and belief (*Treu und Glauben*), unjustified enrichment (*ungerechtfertigte Bereicherung*), and also in criminal law and administrative law they play a major role. The legal proposition while thus seemingly containing a decision norm (*Entscheidungsnorm*) is however really just an instruction to the judge to independently find a decision norm".

Ehrlich (1913, p. 140; 1936, p. 174) concluded that "between the decision according to a legal proposition and without a legal proposition only differences of degree exist": "…the more generally the legal proposition is expressed, the more freedom obviously left to the judge".

"Indeterminate (*unbestimmten*) concepts" such as the nature of the thing (*Natur der Sache*), good morals (*guten Sitten*), faith and belief (*Treu und Glauben*), good faith (*gute Glaube*) in contractual relations "signify, where they are found in legal prescriptions, the renunciation of its author of its [i.e., the author's] own weighing of interests (*Interessenabwägung*)" (Ehrlich, 1917c, p. 354-356). "In jurists' law (*Juristenrecht*)" indeterminate concepts "are an admission of inability to indicate in general (*überhaupt anzugeben*) the circumstances that should determine the weighing of interests in the individual case". The case-law of the courts (*der Rechtsprechung der Gerichte*) and "literary jurisprudence (*die literarische Jurisprudenz*)" were defined by Ehrlich (1917b, p. 59) as the two forms of jurists' law (*Juristenrecht*) in a different

article published in the same year but in a later article he differentiated "judge-made and jurists' law (*richterlichen und Juristenrecht*)" (Ehrlich, 1922a, p. 9).

"One must look for the actually valid (*Wirklich geltende*) French law in *Dalloz* and *Sirey*[249], not in the codes", Ehrlich (1913, p. 350) asserted. He pointed out that in Denmark "barely more than a sentence" of the *Danske Lov*[250] of 15 April 1683 of King Christian V was in 1913 "valid" in its "original sense" (Ehrlich, 1913, p. 350; 1936, p. 434). The "provisions" of the *Danske Lov* which in 2014 "can still be presumed to find application (*der fortsat kan antages at finde anvendelse*)" have been published on a website of Danish statutes and regulations (http://www.retsinformation.dk) maintained by an agency of the Danish Justice Ministry[251]. An "editorial note" by this agency quotes *Danske og Norske lov i 300 år*[252] (1983), a book edited by Professor Ditlev Tamm of the University of Copenhagen:

> "A range of provisions of the code may...be regarded as lapsed (*bortfaldne*), as without significance (*betydningsløse*), others have been expressly repealed in later legislation, while others again must be considered as lapsed in connection with the appearance of new legislation, without there expressly having been a repeal of the provisions of the *Danske Lov*. The legislature has thereby left it to the application of law (*retsanvendelsen*) [i.e., to the courts] to determine the significance of a new statute (*lov*) for the validity of the code".

An article on Ehrlich's "life and legacy" published in 2005 in a Ukrainian academic journal[253] lists almost all of Ehrlich's published works and the published translations (Bihun, 2005, p. 118-121). For the "political writings" not listed in that article see Rehbinder (2007b).

[249] *Recueil Dalloz* and *Recueil Sirey* are series of reports of the decisions of the courts in France.

[250] The *Danske Lov* or Danish statute of 15 April 1683 of King Christian V of Denmark and Norway was "a comprehensive code for the whole of Denmark" (Bollen & de Groot, 1994, p. 109). "This code covered the entire private, criminal and procedural law and abolished all previous legislation".

[251] See https://www.retsinformation.dk/Forms/r0710.aspx?id=59516

[252] The *Danske Lov* and *Norske Lov* at 300 years.

[253] Проблеми філософії права, the transliteration of which is *problemy filosofii prava*. The English-language title of this journal is *Philosophy of Law Issues*.

Free scientific research (libre recherche scientifique)
François Gény (17.12.1861 –16.12.1959)

"Legislation, codified or not, understanding by this, broadly, all the acts of the authority whose duty it is to enact (*d'édicter*) general juridical rules (*règles juridiques générales*), in the form of obligatory injunctions, statutes (*lois*) properly so called, decrees or regulatory orders lawfully made, the *jus scriptum* [written law], in a word, is it, in our social and constitutional state, sufficient for a revelation of the law, by permitting its complete implementation…", François Gény (1919a, p. 112-113) asked. "Do we not discover, on the contrary, in the nature and the mode of action of the written statute (*la loi écrite*), gaps or essential limits, which would open up a necessary place, either to other sources of law, such as custom, or, at least, to the intervention of free scientific research (*libre recherche scientifique*), with a view to an elaboration of a juridical system capable of satisfying all the needs of social life? The field of investigation, which offers itself for our examination, seems to have been little explored", he observed in his book *Méthode d'interprétation et sources en droit privé positif*[254] (Gény, 1919a, p. 112-113).

"In the first rank of formal sources, obligatory for the interpreter of law, is the written statute (*la loi écrite*)…", Gény (1919b, p. 405; 1963, p. 565) wrote. The other formal source of positive law, according to Gény (1919a, p. 355-356; 1963, p. 243), is custom (*coutume*). The two "elements" of any "juridically-obligatory custom" are "a long and constant usage" and "the conviction of a juridical sanction specifying the qualifying the usage as obligatory custom" (Gény, 1919a, p. 356-357). It "can be acknowledged", Gény (1900, p. 24) said in a speech at the University of Dijon on 8 November 1900 on *La notion de droit positif à la veille du XX^e^ siècle*[255], that the formal sources of positive law – "statute (*loi*)" and "custom (*coutume*)" – are not "sufficient to solve all the problems of juridical life (*vie juridique*)":

[254] Method of interpretation and sources in positive private law. A English translation by Ernest Bruncken of sections 155-159 and 169-176 of the first edition was published in 1917 (Gény, 1917a, p. 1). The 1954 translation by Jaro Mayda of the second (1919) edition (Herget & Wallace, 1987, p. 402) is not a "literal" translation (Kasirer, 2001, p. 348).

[255] The idea of positive law on the eve of the twentieth century.

> "…there is still a necessary place for independent research (*recherche*), concerned only with generating solutions according to a strictly scientific method, guided by the initial data of reason or of conscience, and, for the remainder, drawing on the results provided by all the disciplines[256], which, analyzing the social world, reveal to us, in its intimate structure and its profound resources, what we could call the nature of positive things (*la nature des choses positive*), alone capable of supplementing the defaulting formal sources by providing an objective basis for our investigations".

Gény's theory of free scientific research (*libre recherche scientifique*) is discussed in *Méthode d'interprétation et sources en droit privé positif*, the first edition of which was published in 1899[257] and a second edition in two volumes in 1919. Free scientific research involves a "twofold task" (Gény, 1919b, p. 92): (a) "...examining reason and conscience to discover in our innermost nature the very bases of justice..." and (b) "…addressing oneself to social phenomena, to seize the laws of their harmony and the principles of order which they require". The latter has its "firm base in what may be called *the nature of positive things* (la nature des choses positive)…".

"In the absence of a statute or custom appropriate to the case in litigation, the free appreciation of the judge (*la libre appréciation du juge*) then intervenes…" (Gény, 1919b, p. 407):

> "...the free appreciation of the judge (*la libre appréciation du juge*)…must not be exercised arbitrarily but conformably to the model of an ideal legislator…
> Hence the name of 'free scientific research', which I have proposed to apply to it: a name assuredly incomplete, but which puts in relief the aim of objectivity...".

Free scientific research (*libre recherche scientifique*) "is separated, moreover, from the formal sources, in that its effect, even as a pure decision of law, remains limited to the case resolved and may not be applied as a general rule imposing itself on the future" (Gény, 1919b, p. 407).

[256] The social sciences. The social sciences "include psychology, anthropology, sociology, economics, political science, history and probably linguistics", the sociologist George Homans (11.8.1910 – 29.5.1989) wrote in 1967 (Homans, 1967, p. 3).

[257] "I would give everything I have done, and more, to have written Gény's *Méthode*", Hermann Kantorowicz reportedly once said (Hergot & Wallace, 1987, p. 410).

The "power to establish general rules and that of applying them to facts...should be kept separate", Gény (1919b, p. 391) believed.

The scientific research of the interpreter "does not intervene with a full liberty to supplement the defaulting formal souces (statute, custom)" (Gény, 1919b, p. 146-147): "…its exercise is narrower or wider, and the import (*portée*) of its results is more or less firm, according to whether it can be supported either by analogy or by objective elements expressing an acquired social equilibrium, or, according to whether, in default of any positive support, it remains abandoned purely to itself". Free interpretation (*l'interprétation libre*) "cannot give check (*faire échec*) to" general legal principles "consecrated, although sometimes in a latent state, in our formal juridical organization….without distorting its mission and exceeding its rights, in the current state of our civilization"; free interpretation "thus cannot", for example, "establish a privilege in contempt of the principle of equality", Gény (1919b, p. 147) said.

The statute "is nothing other than a volition (*volonté*), emanating from a man or a group and condensed in a formula" (Gény, 1919a, p. 264-265). "This volition can alone form the essential objective of any interpretation, properly so called (*proprement dite*), of the statute" (Gény, 1919a, p. 266; 1963, p. 182). He wrote (Gény, 1919b, p. 405-406):

> "…it itself, the statute (*la loi*) is the expression of a volition (*volonté*), emanating from a man or a group of men, in light of their intelligence. As a result, and to ensure its full efficacy, it must be interpreted according to the intelligent volition which produced it, and by placing it at the moment when it was formulated. No other criterion is acceptable, if one wants to remain faithful to the nature of the statute and maintain its technical advantages. In particular, we cannot admit that the statute, once formed, constitutes an independent entity, which detaches itself from the thought of its author and will develop separately, following its own fate, so that its meaning could change according to (*au gré*) the surrounding circumstances and the evolution of social life. Such a conception would be reduced to a veritable fiction".

Analogy, "which permits itself the elements contained in the legal texts to derive solutions close to (*voisines*) but distinct from those precisely furnished by the legislator, and which manifestly goes beyond the volition of the latter, extending his decision to cases that he had not at all (*aucunement*) considered, does not fall within the interpretation, properly so called (*proprement dite*) of the statute, and can only be admitted as among the means of a freer research, with the

latitude of play inherent in these means and the lesser force of the solutions derived (*proviennent*) from them" (Gény 1919b, p. 406).

Otto Stobbe (28.6.1831 – 19.5.1887), whose view was representative of most civil-law jurists, wrote: "In itself, practice is not a source of law; the individual court can depart from its hitherto existing practice and no court is bound by the practice of another. The deviation from the hitherto observed practice is not only permissible, but enjoined (*geboten*), when better reasons speak for a different treatment of the legal question" (Stobbe, 1882, p. 165; Gray, 1895, p. 33). Court usage (*Gerichtsgebrauch*) "as such, i.e. for the very reason that it is court usage, has in formal terms no binding force, and in material terms only so much worth as belongs to it…due to its inner character (*Beschaffenheit*), Sylvester Jordan (30.12.1792 – 15.4.1861), had written in 1825: "…therefore…a court cannot be bound to follow its own or another court's usage as a decision norm (*Entscheidungsnorm*) …" (Jordan, 1825, p. 245-246). Gény (1919b, p. 49-50) agreed that "case-law has not, in itself, the value of a formal source of juridical rules (*la jurisprudence n'a pas, par elle-même, la valeur d'une source formelle de règles juridiques*)": "I…refuse to see, in our case-law, a formal source of positive private law, which, next to the written statute (*à côté de la loi écrite*) and to custom, can enjoy an independent creative force". He wrote that "judicial decisions…have no worth, in the domain of the creation of juridical rules, but by their intrinsic merit (*rationis imperio*), not by virtue of their form (*ratione imperii*)" Gény (1919b, p. 407). (*Non ratione imperii sed rationis imperio* – not "by reason of their authority" but "by the authority of their reason" (Hennen, 1861, p. 466).) However, he also wrote that "in the presence of a solution, supported by a firm case-law, the interpreter can avoid the necessity of a new investigation, on the strength of recognized precedents...". These "recognized precedents…indicate" to the interpreter "the authority that even he should depart from only for decisive reasons taking his conviction in a contrary sense" (Gény (1919b, p. 49-50). "Assuredly, this is not a legislative force, properly so called…". "It is nonetheless a serious power, which *can* (peut), and, to a certain measure, *must* (doit), hold in check the uncertainties or caprices of subjective reason".

"The question is, therefore: how can the administration of positive law, when the Court is left to itself without help from statute or custom, deal with objective data so as to satisfy the requirements of life without incurring the reproach of being arbitrary, and how should it proceed?" (Gény, 1917a, p. 7). "Aside from the almost insurmountable difficulty of determining in a convincing manner what the state of public opinion may be regarding any given juridical question, I believe that the common judgement, as long as it has not been transformed into an actual custom, ought not to be held to have authority to impose itself on the courts for the solution of juridical problems. Even in the legislative sphere it seems to me very

doubtful whether those entrusted with the duty of establishing general juridical rules ought to be guided principally by public opinion, which is always unstable and very little sure of itself" (Gény, 1917a, p. 7). "I do not see", Gény (1917a, p. 8) wrote, "what serious reason could be given for basing decisions on the recognized influence of general [i.e., public] feeling regarding the matter:

> "I do not intend to say by any means that the court should absolutely refuse to consider public opinion. In so far as it is itself a social fact which must be taken into account, it cannot fail to demand his attention. What I mean to insist upon is that no matter how firmly settled public opinion may seem to be, it must not be allowed to determine the judgement of the court, nor to serve him as a test showing what the law is, for the simple reason that it cannot pretend to be proof of the truth regarding existing conditions, and the only thing to discover and apply practically is that truth".

"In place of subjective conceptions, which are in their very origin inconstant and uncertain, the interpreter needs to discover firm principles which only a careful examination of the nature of things (*nature des choses*, *natur der Sache*) can give him" (Gény, 1917a, p. 11; 1919b, p. 87). "From the nature of things (*Natur der Sache*) we have to complete (*ergänzen*) the legal system", Heinrich Dernburg (3.3.1829 – 23.11.1907) had written seven years earlier (Dernburg, 1892, p. 87). "The relations of life, to a greater or less degree, contain in themselves their own measure and their own intrinsic order. This order immanent in such relations is called the 'nature of things' "[258] (Dernburg, 1892, p. 87, quoted in Bodenheimer, 1974, p. 362). "The thinking jurist", Dernburg continued, "must have recourse to this concept in cases where a positive norm is lacking, or where the norm is incomplete or unclear"[259]. "The norms 'from the nature of things' (*aus der Natur der Sache*)…are the rules of conduct that govern (*beherrschen*) a legal relationship in life; they are the work of life, not of the legislature or another appointed power for setting norms…", Ehrlich (1913, p. 288) wrote.

[258] "The nature of things (*Natur der Sache*) is not to be confused with natural law (*Naturrecht*)" (Dernberg, 1892, p. 87). "Natural law is based on conclusions drawn from the nature of man. It is not suitable for direct legal application (*unmittelbaren Rechtsanwendung*)".

[259] „*Die Lebensverhältnisse tragen, wenn auch mehr oder weniger entwickelt, ihr Mass und ihre Ordnung in sich. Diese den Dingen innewohnende Ordnung nennt man Natur der Sache. Auf sie muss der denkende Jurist zurückgehen, wenn es an einer positiven Norm sehlt oder wenn dieselbe unvollständig oder unklar ist*".

The "principal task" of "free scientific research (*libre recherche scientifique*), according to Gény, 1917a, p. 12), "is the examination of the nature of things (*nature des choses*, *natur der Sache*) themselves":

> "That is an idea which…was introduced into the investigations of jurists by the German, Runde [Justus Friedrich Runde (27.5.1741 – 28.2.1807)], about 1791, and has since that time been much employed by German legal science as a substitute for the formal sources of positive law. On the other hand its intrinsic merits have more than once been disputed, and Windscheid used to stigmatize it as a disreputable expression. Perhaps the discredit with which this notion, in my opinion an indispensable one in any system of positive law, is threatened may be avoided if we define its nature a little more than has heretofore been done and show what good results it may produce. The meaning which Runde attached to this expression and which has been generally accepted, according to which the nature of things (*natur der Sache*) may be considered as one of the sources (*lato sensu*[260]) of positive law, rests upon the following assumption: the relations of social life, or putting it more generally, the facts underlying every juridical organism, carry within themselves the conditions under which they may be in equilibrium and indicate themselves, if one may say so, the rules by which they ought to be governed".

"The question is, how can we create by a scientific effort a sort of common law (*droit commun*), general in its nature and subsidiary in its function, which may supplement the formal sources when they fail, and give a general direction to the whole current of juridical life (*la vie juridique*)?" (Gény, 1917a, p. 13). "Precisely at this point is the place for the idea of the 'nature of things' such as, according to my view, it should be understood. It is not enough merely to consider and analyze in detail all the facts of the life of our society, to observe their mutual relations, to discern how they reciprocally react upon each other. We must also boldly rely upon our moral consciousness and our reasoning powers, and by the use of these faculties trace the laws which govern these phenomena" (Gény, 1917a, p. 14).

[260] In the broad sense (International Court of Justice, 1989, p. 30) (in contrast to *stricto sensu* – in the strict sense) (Mauss, 2009, p. 162).

"The law that harmonizes the facts must be sought outside of the facts themselves", Gény (1917a, p. 13) argued. There are "principles of justice superior to the contingence of facts and...if the facts specify (*précisent*) the realization of the principles, they cannot contain the essence" (Gény, 1919b, p. 101; 1963, p. 370). "These principles of superior justice" are "revealed by reason and conscience…" (Gény, 1919b, p. 102; 1963, p. 371).

The principle of the balancing of the interests involved (*principe de l'équilibre des intérêts en presence*)[261] must (*doit*) guide the jurisconsult interpreter of the law..." (Gény, 1919b, p. 167): "...juridical questions, which can all be reduced to conflicts of interests" should be "resolved...by an exact appreciation and a judicious comparison of the interests involved, aiming to balance them in conformity with social ends" (Gény, 1919b, p. 170; Gény, 1917a, p. 38). "The general means" of balancing the interests involved "consists in recognizing the interests involved, in evaluating their respective strength, in weighing them, as it were, with the scales of justice, with a view to assuring the preponderance of the most important according to a social criterion, and finally to establish between them the balance eminently desirable" (Gény, 1919b, p. 167; Gény, 1917a, p. 35-36).

"Balancing" is, according to Grimm (2009, p. 2382), "a non-hierarchical way to solve conflicts between…rights or interests". "It requires…the judge to take the colliding rights and interests seriously, weigh them against each other and try to preserve as much as possible of both". It "does not", however, "save…the judge from deciding which right or interest shall ultimately prevail in which situation", he conceded.

Hans Kelsen (1967, p. 352) criticized *Interessenabwägung*[262] – the weighing[263] of interests – as "merely a formulation of the problem, not a solution":

> "It does not supply the objective measure or standard for comparing conflicting interests with each other and does not make it possible to solve, on this basis, the conflict. It is impossible to derive this measure or standard from the norm that is to be interpreted, or from the statute that contains the norm, or from the entire legal order, as has been asserted by the theory of the so-called 'weighing

[261] See also Ehrlich (1917b) and Ehrlich (1917c) on the weighing of interests (*Interessenabwägung*) and the work of Ernst Stampe (2.5.1856 – 13.1.1942) on *Interessenwägung*.

[262] Translated by Kelsen (1967, p. 352) as "weighing of interests".

[263] The most accurate translation of the German term *Abwägung* is "weighing" (Grieb & Schröer, 1907, p. 33) but it is also translated as "balancing" (Schmidt & Tanger, 1907, p. 33; Baumann, 1933, p. 28).

> of interests'. For the need for an 'interpretation' results precisely from the fact that the norm to be applied or the system of norms leaves open several possibilities – and this means that it contains no decision as to which of the interests in question has a higher value than the others, but leaves this decision to an act of norm-creation to be performed, for example in rendering a judicial decision".

In *Méthode d'interprétation et sources en droit privé positif* Gény (1919b, p. 77-78) wrote: "…in the silence or the insufficiency of the formal sources [of law]...the judge...must form his legal decision according to the same aims which would be those of the legislature, if it proposed to regulate (*régler*) the question". He quoted in a footnote Aristotle and Philippe-Antoine Merlin (30.10.1754 – 26.12.1838). Those quotations are included in the discussion of Article 1 of the Swiss Civil Code in this chapter.

Interpretation of statutes (Auslegung der Gesetze)
Josef Kohler (9.3.1849 – 3.8.1919)

Josef Kohler (9.3.1849 – 3.8.1919), in a letter of 22 October 1914, asserted: "…in truth and reality, I have been a free law jurist for more than twenty years" (Foulkes, 1969, p. 397). Cohen (1914, p. 182) referred to articles by Kohler in 1886 (*Ueber die Interpretation von Gesetzen*[264]) and 1887 (*Die schöpferische Kraft der Jurisprudenz*[265]) in which, Cohen wrote, "the movement for 'free' creative…interpretation" had been "elaborated with unusual keenness by Kohler...".

Kohler (1910, p. 503) observed that "modern man…gives definitions in the sense of characterizations". This is his "characterization" of law (Kohler, 1909, p. 39):

> "The law (*das Recht*) is the norm of behaviour that imposes itself on the individual as a result of the internal desire of the totality for a reasonable form of life (*vernünftiger Lebensgestaltung*). It differs from convention, usage, from religion once one comes to separate compulsory norms (*Zwangsnormen*) from such precepts (*Geboten*) that only condition social convenience, not the possibility of remaining unobjected in society"[266].

"The law (*das Recht*)...creates compulsory norms (*Zwangsnormen*)..." (Kohler, 1910, p. 504).
In *Ueber die Interpretation von Gesetzen* Kohler (1887a, p. 270) "explained that the statutes furnish the legal principles, but that the further development of legal configurations (*Gestaltungen*) from these principles is not interpretation but on the contrary new formation (*Neubildung*) and is the creative work of jurisprudence". Kohler (1886, p. 1-2) had in that article contrasted the "will" of "the author of the statute" with the "will" of the statute:

[264] On the interpretation of statutes.

[265] The creative power of jurisprudence.

[266] „*Das Recht ist die Norm des Verhaltens, die sich infolge des innerlichen Triebes nach vernünftiger Lebensgestaltung von der Gesamtheit aus dem Einzelnen aufdrängt. Es scheidet sich von Sitte, Brauch, Religion aus, sobald man dazu kommt, Zwangsnormen von solchen Geboten zu trennen, die nur die gesellschaftliche Annehmlichkeit, nicht die Möglichkeit des unbeanstandeten Verbleibens in der Gesellschaft bedingen*".

> "It is not what the author of the statute wants that is decisive, but what the statute wants – though the law has no will in a psychological sense, but a will in the teleological sense as an organic purposeful endeavour (*organischen Zweckbestreben*); and those legal results which occur are not those which the author of the statute intends but those which arise from that organic purposeful endeavour…".

"The author of the statute can create or not create a statute; but if he creates it, he creates it with all its direct and indirect legal consequences, which possibly lie far beyond his ken", Kohler (1886, p. 2-3) asserted.

Sections 38, 39 and 40 of *Lehrbuch des bürgerlichen Rechts* concern the interpretation of statutes (*Auslegung der Gesetzes*). "To interpret means to look for the meaning and significance behind the expressed words", Kohler (1906; p. 122-123; 1917, p. 187) wrote:

> "The necessity for interpretation appears not merely from the consideration that thoughts cannot be communicated except by some external means of expression, but also from this, that frequently thoughts do not become clear and perspicuous in the thinker's own mind until they are expressed. The latter consideration has commonly escaped attention, and a succession of errors has resulted. To interpret is to discover meaning and significance. It does not concern the meaning and significance of what some person intends to say, but of what is actually said".

"To believe that legislation depends exclusively on the intention of the legislator (*Gesetzgeber*) is evidence of an entirely unhistorical attitude toward historical processes", Kohler (1906, p. 123; 1917, p. 188) argued:

> "We have entirely overlooked the fact that the legislator is a man of his age, completely saturated with the ideas of his time, completely filled with the civilization surrounding him. We forget that he must work with notions and conceptions taken from the intellectual atmosphere in which he lives; that he must employ words which have a history stretching back for centuries, words the meaning of which is fixed by a sociological process of language formation that has lasted for thousands of years and lies by no means within the personal

> choice of the individual. To believe that legislation depends exclusively on the intention of the legislator is evidence of an entirely unhistorical attitude toward historical processes. Such notions ought to disappear completely from legal science".

"The former method of interpretation consisted of nothing but errors. It failed to recognize the social nature of mental creation (*Geistesschöpfung*), it failed to recognize the infinity of concealed content in the words, it failed to recognize the self-standingness of the thought (*die Selbständigkeit des Gedankens*) as against the thinking and expressing" (Kohler, 1906, p. 129; 1917, p. 195). "By making the thought a slave of the will" this method of interpretation "came to the proposition: that which the legislator has willed (*gewollt*) is valid". This is "completely wrong" (Kohler, 1906, p. 129; 1917, p. 195). It is, Kohler (1906, p. 123; 1917, p. 188) said, "a common error to believe that thought is a complete slave of our will and never produces anything but what we intend":

> "In reality, thought is quite independent of will and often goes far beyond what the will intended. A thought of this kind is uncertain and indeterminate until it becomes clear by being expressed, but even then it remains impossible that all it contains, down to the last and most profound depths, should be apparent at once".

"Statutes require interpretation because they cannot be communicated except by words, and because the thought is concealed under the word as under a garment" and also "because the thought contained in a statute is only partially clear to the author of the statute, who is no more the master of the thought than thought in other instances is the mere slave of the will" (Kohler, 1906, p. 124; 1917, p. 189).

"The thought of the statute moves in the words…"[267] (Kohler, 1906, p. 131). The "legislator (*Gesetzgeber*) cannot legislate as a private person but only as a legislator; as a legislator he can only speak through the words of the statute: everything else he does is a private matter (*Privatsache*) and without legislative substance (*gesetzgeberischen Gehalt*)" ((Kohler, 1906, p. 124-125). Kohler (1906, p. 125) quoted the decision of 25 March 1891 of the German *Reichsgericht* in RGZ 27, 409, 411:

[267] „*Der Gedanke des Gesetzes bewegt sich in den Worten*...".

> "The legislator can only speak in one language, by publication of the statute. What cannot be taken from the statute is not statutory law"[268].

"The legislator", Kohler (1906, p. 124-125; 1917, p. 190) wrote, "can therefore only act in the way that he sets out (*darlegt*) in words a thought-content (*Gedankeninhalt*), or rather, that he gives words from which a thought-content is to be inferred (*entnehmen*):

> "While one might, at first glance, assume that the thought expressed in the statute is the thought that was in the mind of the legislator, but which has an effect more or less independent of the thinker, it appears now that the act of legislation has produced a definite text, and that this text, and nothing else, bears within itself legislative force. If this text conceals within itself 4, 5 or 6 different thoughts, any one of which may be gathered from it, the consequence must be that not one thought, but any of these thoughts, whichever may be selected, has been made statutory. By this it is not intended to say that any one of these five or six thoughts may be arbitrarily picked out, but rather that it is the task of juristic skill (*juristischen Kunst*) to select the correct (*richtigen*) one from among these five or six thoughts".

"Interpreting a statute means not only to find the meaning concealed behind the expression, but also to select from the various meanings which the text may bear that meaning which must be held to be the correct and authoritative one" (Kohler, 1906, p. 125; 1917, p. 190). "The thought of the statute (*der Gedanke des Gesetzes*) is then any thought that can reside (*liegen*) in its words, and thus the statute can include 2, 3, 5 or 10 thoughts, any one of which can be considered the correct one" (Kohler, 1906, p. 125-126; 1917, p. 191). "The principles of interpretation, therefore, must be fit to help us not merely to find the possible thoughts concealed in the text, but also to select from all possible thoughts found the correct one". The "correct thought (*richtige Gedanke*)…can be distinguished in various ways". For Kohler, the "main thing (*Hauptsache*)" is that we choose from the possible thoughts of the statute (*von den möglichen Gedanken des Gesetzes*) the one "in which the statute has the most reasonable and salutary meaning and which will produce the most beneficial effect (*bei welchem das Gesetz den vernünftigsten, heilsamsten Sinn hat und die wohltuendste Wirkung äußern wird*)". If according to this "approach" several interpretations are "possible" one must "enter into the

[268] „*Der Gesetzgeber kann nur in einer Sprache sprechen, durch Publikation des Gesetzes. Was nicht aus dem Gesetze entnommen werden kann, ist nicht gesetzliches Recht*".

interrelation of the statutory provisions and prefer that interpretation by which the statute finds the most consistent, most correct organic construction". If that should not achieve a "reliable result…one must enter into and take account of the purposeful endeavour (*Zweckbestreben*) of the statute, what intentions, desires and fears aroused the world when the statute was adopted and sought to meet a need of the social world" (Kohler, 1906, p. 126; 1917, p. 192): "…it is quite right that whenever the other ways of interpretation do not satisfy us we should adopt an interpretation which is not only the most reasonable but which also comes nearest to what the statute had in view".

"The statute may potentially contain two thoughts if one understands all the expressions in their natural meaning; but at the same time it can hold another six other thoughts when one takes one or the other of its expressions in a metaphorical, figurative meaning, when it is expanded beyond the ordinary meaning or contracted under the ordinary significance". "The question", Kohler (1906, p. 132; 1917, p. 199) said, "is whether legal science is permitted in such cases to also selectively (*wahlweise*) take these latter six thoughts take into consideration and assume that for once the means of expression has been improper, awkward and unusual". "This is answered in the affirmative; since as in life so also in the statute the mode of expression is by no means always nearest to the ordinary, hackneyed and the literal wording (*Wortlaut*)". "In the selection of meanings the jurist may assume that the expressions are possibly figurative and uncommon, and perhaps only approximately, not completely delimit and encompass that which they should" (Kohler, 1906, p. 199-200; 1917, p. 199-200). The "interpretation" of the statute "must by no means always remain the same", Kohler (1906, p. 127; 1917, p. 192) emphasized. "The interpretation can change and must therefore change" (Kohler, 1906, p. 128; 1917, p. 194). The statute "can be elastic, corresponding to the various changing requirements and unfold a beneficial effectiveness, even when all the circumstances have changed under which it came into being" (Kohler, 1906, p. 127; 1917, p. 193). Kohler (1906, p. 128; 1917, p. 194) remarked that "the whole apparatus of the law of fair competition" in France is "grounded in two articles" of the Civil Code – Articles 1382[269] and 1383[270] – "to which originally nobody had been able to ascribe any such meaning (*denen man früher weitaus nicht diese Bedeutung beimessen konnte*)". "In essence", the German jurist Eugen Ulmar (26.6.1903 – 26.4.1988) said in 1962, "French law on unfair competition is judge-made law" (Ulmer, 1963, p. 629). "French law on unfair competition has been developed by case-law on the basis of the general provisions of Articles 1382 and 1383...", he confirmed (Ulmer, 1963, p. 628).

[269] "Any act whatsoever of man, which causes damage to another, obliges the one by who fault it is arrived to repair it".

[270] "Everyone is responsible for the damage that he has caused not only by his act, but also by his negligence or by his imprudence".

The law-creation of the judge (richterliche Rechtsschaffung)
Oskar Bülow (11.9.1837 – 19.11.1907)

"The self-standing law-determining power of the office of judge (*selbständige Rechtsbestimmungsmacht des Richteramts*)…" (Bülow, 1885, p. 39; 1995, p. 91) was examined by Oskar Bülow in his book *Gesetz und Richteramt*[271] (1885). According to Ehrlich (1903, p. 29), Bülow "convincingly demonstrated" in this book that "all law-finding (*Rechtsfinding*), even where it appears (*auftritt*) as mere application of law (*Rechtsanwendung*), is necessarily creative (*notwendig schöpferisch*)". Judge-made law (*richterlichen Recht*) has to be "acknowledged", Bülow (1885, p. 2) asserted. However, as Ehrlich (1917b, p. 79) noted, Bülow "decidedly condemned" Ehrlich's theory of free law-finding (*freie Rechtsfindung*):

> "To him case-law was in the end nothing but application of statutes (*Gesetzesanwendung*), albeit an application of statutes (*Gesetzesanwendung*) passing through (*hindurchgehend*) the personality of the judge; there is no mention by him of a law-finding (*Rechtsfindung*) going beyond this. It was therefore only logical that he decidedly condemned free law-finding, as it has been taught by me…".

"The essence of the office of judge lies in *judging*", Bülow (1885, p. 4) wrote in *Gesetz und Richteramt*. While the characterization of "judicial activity" as "a purely intellectual activity like any other judging: a logical operation, a conclusion, for which the statutory constitutes the major premise and the facts to be judged constitute the minor premise" is usually considered "correct" (Bülow, 1885, p. 4-5), the "function and effectiveness of the office of judge in its full significance, particularly in its relationship to statutory law (*Gesetzesrecht*)" cannot be "apprehended" without considering "the numerous perceptions which point to the fact that an abundant law-organizing and law-creating force (*eine reiche rechtsordnende und rechtsschöpferische Kraft*) moves in the office of judge (*Richteramt*) which has survived in the midst of all this statutory law (*Gesetzesrecht*) and will never be destroyed by even the most complete and perfect legislation" (Bülow, 1885, p. 1-2; 1995, p. 74).

[271] Statute and the office of judge. Translated in 1995 as "Statutory Law and the Judicial Function" (Bülow, 1995, p. 71).

The promulgated statute is "not yet valid law (*geltendes Recht*); it is only a plan, only the outline (*Entwurf*) of a desired future legal order (*zukünftigen, erwünschten Rechtsordnung*) which the legislature by itself has not the power to finish" (Bülow, 1885, p. 2-3; 1995, p. 75). The "realization of the statutory legal plan (*gesetzlichen Rechtsplan*)" faces "obstacles everywhere" and, in addition to the legislative apparatus, the state therefore holds "ready" another "legal institution (*Rechtsanstalt*), the office of judge (*das Richteramt*)". "Judicial activity helps to continue (*fortführen*) and complete (*vollenden*) the law-ordering work (*Rechtsordnungswerk*) that has only begun in the statute" (Bülow, 1885, p. 3-4; 1995, p. 75).

"Day after day, real life mocks legislative foresight. Its unlimited diversity teaches over and over again how presumptuous the hope would be that the legislature could anticipate everything the future will bring and force it into its rigid, dead rules" (Bülow, 1885, p. 30; 1995, p. 87):

> "…not even the most ample experience, not the greatest care, not the most animated imagination, is a match for the colourful game in which the free striving human will, the inventive sense of acquisition, the slyness of egoism and crime, in combination with contingencies beyond any human foresight to control, force the creation of the strangest and most intricate legal problems. The legislature could not think of these problems and thus could not desire a solution, much less could it have one ready".

"Even the most complete legislation is as yet unable to complete the legal order by itself. It cannot even draft the plan for such legal order completely in all details. The statute must leave many and important things up to the independent, and in the details more exact, more certain, law-ordering work (*Rechtsordnungsarbeit*) to the other institution of the law (*Rechtsanstalt*), the office of judge (*des Richteramts*)" (Bülow, 1885, p. 30; 1995, p. 87).

The "inadequacy of the legislative law-ordering ability (*gesetzgeberischen Rechtsordnungsvermögens*) becomes apparent in the most ordinary cases in any litigation in which the parties fight each other *bona fide* with opposing legal reasons" (Bülow, 1885, p. 32; 1995, p. 87-88):

> "It can be seen with greatest clarity, when the legal evaluation of the facts undergoes changes by the court from instance to instance (*mit größter Deutlichkeit, wenn die rechtliche Beurtheilung des Thatbestandes auch bei Gericht von Instanz to Instanz Wandelungen erfährt*). Each of these

> innumerable cases is a unique legal problem (*eigenthümliches Rechtsproblem*) for which the appropriate legal determination (*Rechtsbestimmung*) is not yet ready at hand in the statutes, and, as experience has shown so painfully, also cannot be deduced from the statutory determinations (*gesetzlichen Bestimmungen*) with the absolute certainty of a cogent logical conclusion".

"The activity of the legislature stops with the single abstract legal precept (*dem einmaligen abstrakten Rechtsgebot*). It is the continued conscientious, vocational work of the judge that is to be thanked for making the legal order (*Rechtsordnung*), so far as human insight and ability are adequate, that which it should be: a power raised above every opposing knowledge and volition, truly controlling the lives of people (*eine über jedem gegensätzlichen Wissen und Wollen erhabene, das Leben der Menschen wirklich beherrschende Macht*)" (Bülow, 1885, p. 4; 1995, p. 75).

"The judgement of the judge (*richterliche Urtheil*) rests, like every prudent expression of intention (*besonnene Willensäußerung*), upon an act of thought (*Denkthätigkeit*). It embodies and signifies, however, a legal determination, a legal arrangement (*Rechtsanordnung*). It is an expression of will, indeed, a legal expression of will (*Rechtswillenserklärung*) proclaimed by the state authority (*Staatsgewalt*), similar to a statute" (Bülow, 1885, p. 6; 1995, p. 76). "The legal decision (*Rechtspruch*) as well as the statute are acts of the law-ordering state authority (*Akte der rechtsordnenden Staatsgewalt*)" (Bülow, 1885, p. 6-7; 1995, p. 76):

> "Like the statutory, the legal determinations of the judge are filled with the power and compulsory force of the state. The judgement of the judge has legal force; it carries the entire power of the law in itself (*Das richterliche Urtheil hat Rechtskraft: es trägt die ganze Kraft des Rechts in sich*). The legal determination of the judge approaches, in its assigned domain, the power of an unalterable legally-binding arrangement (*einer unverrückbaren rechtsverbindlichen Anordnung*), even in fuller measure and with still stronger direct effectiveness than the merely abstract law-normalization (*Rechtsnormirung*) of the statute".

Bülow (1885, p. 7; 1995, p. 76) even claimed that "legal force is stronger than statutory force (*Die Rechtskraft ist starker als die Gesetzeskraft*)". "The non-appealable legal judgement holds its own even if it runs contrary to the statute. The law-ordering state authority (*die*

rechtsordnende Staatsgewalt), speaks its last word, not with the statutory, but with the legal determinations of the judge (*richterlichen Rechtsbestimmungen*)" (Bülow, 1885, p. 10; 1995, p. 78):

> "Because directed to the future, the statute anticipates classes of factual possibilities and contains conditional and abstract legal determinations (*Rechtsbestimmungen*). The judge, on the other hand, is always occupied with specific, concrete facts (*einzelnen, konkreten Thatbeständen*) and has to make (*treffe*) his legal determinations unconditionally (*unbedingt*)".

The "statutory legal determination (*gesetzliche Rechtsbestimmung*) extends much more widely and operates more generally than the judicial, but is surpassed by the judicial through the latter's greater certainty and unconditional immediate efficacy" (Bülow, 1885, p. 10-11; 1995, p. 78). The "freedom with which the legislature has the lawful power to select its legal arrangement (*Rechtsanordnung*), and the legal dependency (*rechtlichen Abhängigkeit*) of the judge on the statutory determination which does not allow him a choice other than the legal result (*Rechtsfolge*) already prescribed (*vorgezeichneten*) by the statute", is a more important "difference" (Bülow, 1885, p. 11; 1995, p. 78). This, to Bülow, "touches on" the crux of the "whole question":

> "Is that which the judge has to decree already determined in advance by statute? Is it sacred judicial duty not to move over the line outside of statutory determinations (*gesetzlichen Bestimmungen*) or to remain back behind them…?".

"If so", he wrote, "it really appears to be inconceivable how there should still remain open in addition some kind of room for a judge's own law-determining (*rechtsbestimmende*) and law-creating (*rechtsschöpferische*) effectiveness". "According to this, does the theorem of the law-creative vocation of the office of judge (*das Theorem von dem rechtsschöpferischen Beruf des Richteramts*) turn out to be a rather dangerous notion...?"

"The statute is only a preparation, an *attempt to effectuate a legal order*", Bülow (1885, p. 45-46; 1995, p. 93) wrote:

> "The statute contains only an instruction (*Anweisung*) as to how the legal order should be arranged. This instruction is first of all aimed at the people involved, to those people with whose legal relations it deals. The more sensible, certain and clear the statutory directive (*Gesetzesweisung*), and the abler and sounder the legal sense that fills the people, the more frequently the people involved will find the appropriate legal rules themselves and will obey them while living together in full agreement without the power of the state having to act. If this fails, however, then the office of judge (*Richteramt*) has to be set in motion in order to issue (*erlassen*) the required legal determination (*die erforderliche Rechtsbestimmung*) in the name of the state. In this connection, the judge has to stay within the legal limits (*Rechtsgrenzen*) drawn by the statute just as legislation is bound by the limits of the state constitution (*Staatsverfassung*). But in neither of the two cases is the legal determination (*Rechtsbestimmungen*) already directly given by the statute. It is found there first by the parties involved, here first by the judge".

"In the statute, the law-ordering volition of the state authority (*rechtsordnende Wille der Staatsgewalt*) does not yet come to a conclusion; it only emerges completed in the rulings of judges (*richterlichen Rechtssprüchen*)" (Bülow, 1885, p. 46-47; 1995, p. 94): "The legislature conceives the legal thought (*Rechtsgedanken*) still unfinished. The parties involved and, if they do not become unanimous, the judges think it to the end".

"Our statutes are not the uniform declarations of intent of individual persons", Bülow (1885, p. 35-36; 1995, p. 89) stressed:

> "They are *collective declarations* (Collektiverklärungen); many and diverse human beings participated in their development. If we wanted to make a survey of all of them as to what 'he', what this many-headed legislator actually thought and intended, we would find that some, as honest men, would be completely at a loss for an answer. They may not have thought anything at all about this legal rule, and maybe they were not even able to understand the legal draft which was full of legal terms, even if they really read it through. As for the rest, we would have to be ready for the possibility of various types of answers. How often appear openly opposing opinions of the jointly adopted statute in the legislative proceedings!

> Under these circumstances, the unity of the legislative expression of intent is limited to the text. Under the deceptive veil of the same statutory text, there lies a multitude of legal opinions and directions of legal intent!"

The thought of the legislator (*der gesetzgeberische Gedanke*) is also subject to "the danger that threatens every thought in the attempt to make it known by external means, – the danger that it is not brought completely and discernibly certain to expression..." (Bülow, 1885, p. 39).

The state authority (*Staatsgewalt*) "can do without the dead words of the statutes (*des todten Gesetzeswortes*)"[272] but "has never been able to and will never to able to without…the *viva vox*[273] of the office of judge" (Bülow, 1885, p. 47; 1995, p. 94):

> "*For that reason*, the rise of legislation has not been able to *supplant* (verdrängt) the law-creating power of the office of judge (*die rechtsschöpferische Macht des Richteramts*), but that power has only been put under the *guidance* of legislation (*die* Leitung *der Gesetzgebung*)".

Bülow reacted to the publication of Kantorowicz's *Der Kampf um die Rechtswissenschaft* with an article *Über das Verhältnis der Rechtsprechung zum Gesetzesrecht*[274] (1906) in which he insisted on "the unconditional bindingness of statutory law for case-law (*die unbedingte Verbindlichkeit des Gesetzesrechts für die Rechtsprechung*)" and accused Kantorowicz of pleading for "a complete, not confined at all by statutory law, freedom of case-law (*eine völligen, vom Gesetzesrechte überhaupt nicht eingeengten Freiheit der Rechtsprechung*)". This accusation is based on "quotations torn from their context", Radbruch (1907, p. 243) said in a review of Bülow's article.

[272] "That is why the state authority has for such a long time been able to perform its law-ordering job *without* legislation" (Bülow, 1885, p. 47).

[273] "The living voice" (Burrill, 1851, p. 1047).

[274] On the relation of case-law to statutory law.

Article 1 of the Swiss Civil Code
Eugen Huber (13.7.1849 – 23.4.1923)

Kantorowicz (1911c, c. 352), in an article in the *Deutsche Richterzeitung* in 1911, wrote that Article 1 of the Swiss Civil Code was "the hitherto most important manifestation (*Kundgebung*) expressed of the free law standpoint". Eugen Huber's "formulation…can be viewed...as a summarizing creed (*zusammenfassendes Glaubensbekenntnis*)" of all free law jurists, Gustav Radbruch (1990, p. 196) said in *Vorschule der Rechtsphilosophie*[275] (1948).

The Swiss Civil Code[276] was adopted on 10 December 1907 and entered into force on 1 January 1912. The preliminary draft (*Vorentwurf*; *avant-projet*), of which Huber[277] was the editor (BBl. 1904, IV, 3; FF 1904, IV, 4), was published in German and French on 15 November 1900 by the Federal Department of Justice and Police. (Huber also wrote the *Erläuterungen zum Vorentwurf des Eidgenössischen Justiz- und Polizeidepartements*[278] (Gény, 1904, p. 1031).) The draft (*Entwurf*; *projet*) of 28 May 1904 of the Federal Council was published in German in the *Schweizerisches Bundesblatt* on 15 June 1904 (BBl. 1904, IV, 1) and in French in the *Feuille fédérale suisse* on 16 June 1904 (FF 1904, IV, 1). On 21 December 1907 the Swiss Civil Code was published in the *Schweizerisches Bundesblatt* (BBl. 1907, VI, 589) and the *Feuille fédérale suisse* (FF 1907, VI, 429). Article 116 of the Federal Constitution of 29 May 1874 of the Swiss Confederation recognized the Italian language as one of the three "main languages" of Switzerland and a "national language of the Confederation" [279]. The Swiss Civil Code was therefore also promulgated in Italian.

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[275] Introduction to legal philosophy.

[276] *Schweizerisches Zivilgesetzbuch*; *Code civil suisse*.

[277] For a biography of Eugen Huber see Guhl (1945).

[278] Elucidations to the preliminary draft of the Federal Justice and Police Department. This was published in German and French in 1901. The French title is *Exposé des motifs de l'avant-projet du Département fédéral de justice et police* – Exposition of motives of the preliminary draft of the Federal Department of Justice and Police. A second edition was published in 1914.

[279] „*Die drei Hauptsprachen der Schweiz, die deutsche, französische und italienische, sind Nationalsprachen des Bundes*" (Bundeskanzlei, 1891, p. 35). « *Les trois principales langues parlées en Suisse, l'allemand, le français et l'italien, sont langues nationales de la Confédération* » (Bundeskanzlei, 1891, p. 80). "*Le tre lingue principali della Svizzera, la tedesca, la francese e l'italiana, sono lingue nazionali della Confederazione*" (Bundeskanzlei, 1891, p. 126). An English translation of the Federal Constitution of 29 May 1874 of the Swiss Confederation was published in 1888 by the Department of State of the United States of America (Department of State, 1888, p. 412-422). The Federal Constitution of 29 May 1874 was abrogated on 1 January 2000 and the current constitution of the Swiss Confederation is the Federal Costitutution of 18 April 1999; see http://www.admin.ch/org/polit/00083/?lang=en

"The Italian translation is on average more faithful and sense-correspondent (*sinnentsprechender*)" to the original German text of the Swiss Civil Code than the French translation (Lößl, 1911, p. 244). Raymond Saleilles wrote in a letter in 1910 that he had "encountered" in both the French and Italian texts of the Swiss Civil Code, "but especially in the French text, negligence of translation, vague approximation, sometimes even irregularities and inexactitudes..." (Cesana, 1918, p.101). "The multilingual edition of a code is in general an evil and if one wants to retain legal equality, *the utmost care* is required here", Josef Kohler, one of the representatives of the free law movement, cautioned in a letter of 21 February 1911 (Cesana, 1918, p. 114) (emphasis in original).

"Application of the law (*Anwendung des Rechts*)" is the marginal title (*Randtitel*) of the German text of Article 1 of the Swiss Civil Code (BBl. 1907, VI, 589). It reads:

> „*Anwendung des Rechts.*
>
> *Das Gesetz findet auf alle Rechtsfragen Anwendung, für die es nach Wortlaut oder Auslegung eine Bestimmung enthält.*
>
> *Kann dem Gesetze keine Vorschrift entnommen werden, so soll der Richter nach Gewohnheitsrecht und, wo auch ein solches fehlt, nach der Regel entscheiden, die er als Gesetzgeber aufstellen würde.*
>
> *Er folgt dabei bewährter Lehre und Überlieferung*"[280].

> "Application of the law
>
> The statute applies to all legal questions for which it contains a provision according to the wording or interpretation.
>
> If no prescription (*Vorschrift*) can be taken from (*entnommen werden*) the statute, the judge shall decide according to customary law and, where such is lacking, according to the rule that he would set up (*aufstellen*) as a legislator.
>
> He follows in doing so established (*bewährter*) doctrine and tradition".

Although the German, French and Italian texts of Article 1 of the Swiss Civil Code are "equally authoritative" (Moses, 1935, p. 249) they are "quite divergent (*assez divergents*)" (von Overbeck, 1984, p. 987). The Italian text of Article 1 is as follows:

[280] On 1 January 2000 the expression "the court (*das Gericht*)" replaced "the judge (*der Richter*)" in the German text of Article 1 paragraph 2 (see *Amtliche Sammlung des Bundesrechts* 1999 1118 1144) (Bundesbehörden der Schweizerischen Eidgenossenschaft, 2012).

"*Applicazione del diritto.*

La legge si applica a tutte le questioni giuridiche alle quali può riferirsi la lettera od il senso di una sua disposizione.

Nei casi non previsti dalla legge il giudice decide secondo la consuetudine e, in difetto di questa, secondo la regola che egli adotterebbe come legislatore.

Egli si attiene alla dottrina ed alla giurisprudenza più autorevoli".

"Application of the law

The statute is applicable to all legal questions which may relate to the letter or the sense of one of its dispositions.

In cases not provided for by statute, the judge decides according to custom and, failing this, according to the rule that he would adopt as a legislator.

He adheres to the most authoritative doctrine and case-law".

The following is the French text of Article 1 (FF 1907, VI, 429):

« *Application de la loi.*

La loi régit toutes les matières auxquelles se rapportent la lettre ou l'esprit de l'une de ses dispositions.

A défaut d'une disposition légale applicable, le juge prononce selon le droit coutumier et, à défaut d'une coutume, selon les règles qu'il établirait s'il avait à faire acte de législateur.

Il s'inspire des solutions consacrées par la doctrine et la jurisprudence ».

"Application of the statute.

The statute governs all matters within the letter or the spirit of one of its provisions.

In default of an applicable statutory provision, the judge pronounces in accordance with customary law and, in default of a custom, according to the rules he would establish if he had to act as a legislator.

He is inspired by solutions consecrated by doctrine and case-law".

The French text of Article 1 of the preliminary draft (*Vorentwurf*; *avant-projet*) had stated (Département fédéral de justice et police, 1900, p. 5):

> « *La loi civile s'applique à toutes les causes qu'elle régit selon sa lettre ou son esprit.*
>
> *En l'absence d'un texte légal applicable, le juge prononce selon le droit coutumier, et, en l'absence d'un droit coutumier, suivant la doctrine et la jurisprudence.*
>
> *A défaut de ces sources, il appliquera les règles qu'il édicterait, s'il avait à faire office de législateur* ».
>
> "The civil statute is applicable to all of the causes it governs according to its letter or spirit.
>
> In the absence of an applicable legal text, the judge pronounces according to customary law, and, in the absence of customary law, according to doctrine and case-law.
>
> In default of these sources, he applies the rules he would enact if he had to act as a legislator".

In the draft (*Entwurf*; *projet*) of 28 May 1904 this was changed to the following (BBl. 1904, IV, 100):

> « *La loi civile est applicable à toutes les causes auxquelles se rapportent la lettre ou l'esprit de l'un de ses textes.*
>
> *A défaut d'un texte légal applicable, le juge prononce selon le droit coutumier et, en l'absence d'un droit coutumier, suivant les règles consacrées par la doctrine et la jurisprudence.*
>
> *S'il ne peut recourir à, aucune de ces sources, il applique les règles qu'il devrait édicter s'il avait à faire office de législateur* ».
>
> "The civil statute is applicable to all cases that relate to the letter or spirit of one of its texts.
>
> In default of an applicable legal text, the judge pronounces according to customary law and, in the absence of a customary law, according to the rules consecrated by doctrine and case-law.

If he cannot resort to any of these sources, he applies the rules that he would enact if he had to act as a legislator".

This is the German text of Article 1 of the preliminary draft (*Vorentwurf*; *avant-projet*) of 15 November 1900 (Département fédéral de justice et police, 1900, p. 5):

„*Das Civilgesetz findet auf alle Rechtsfragen Anwendung, für die es nach Wortlaut oder Auslegung eine Bestimmung enthält.*

Fehlt es in dem Gesetze an einer Bestimmung, so entscheidet der Richter nach dem Gewohnheitsrechte und wo auch ein solches mangelt, nach bewährter Lehre und Überlieferung.

Kann er aus keiner dieser Quellen das Recht schöpfen, so hat er sein Urteil nach der Regel zu sprechen, die er als Gesetzgeber aufstellen würde".

"The civil statute applies to all legal questions for which it contains a provision according to the wording or interpretation.

In the absence of a provision in the statute, the judge decides according to customary laws and where such is lacking, according to established doctrine and tradition.

If he can derive (*schöpfen*) the law from none of these sources then he has to pronounce his judgement according to the rule that he would set up (*aufstellen*) as a legislator".

The draft (*Entwurf*; *projet*) of 28 May 1904 did not significantly amend the German text of that article (BBl. 1904, IV, 100):

„*Das Gesetz findet auf alle Rechtsfragen Anwendung, für die es nach Wortlaut und Auslegung eine Bestimmung enthält.*

Fehlt es an einer gesetzlichen Vorschrift, so entscheidet der Richter nach Gewohnheitsrecht und, wo ein solches nicht besteht, nach bewährter Lehre und Überlieferung.

Kann er aus keiner dieser Quellen das Recht schöpfen, so fällt er sein Urteil nach der Regel, die er als Gesetzgeber aufstellen müßte".

> "The statute applies to all legal questions for which it contains a provision according to the wording and interpretation.
>
> In the absence of a statutory prescription, the judge decides according to customary law and, where such a customary law does not exist, according to established doctrine and tradition.
>
> If he can derive the law from none of these sources, the judge pronounces his judgement according to the rule that he would set up (*aufstellen*) as a legislator".

The "object" of Article 1 of the Swiss Civil Code, according to François Gény (1919b, p. 316), "is twofold: firstly, it determines the sources, in the widest sense of the word, from which those who research the law can and must draw their solutions; and secondly, it fixes, between those sources, a hierarchy of rank...". "The first source to consult, in the presence of a given case, is naturally the statute, which," he said, quoting the French text of Article 1 paragraph 1, "governs all matters within the letter or spirit of one of its provisions" (Gény, 1919b, p. 316; 1963, p. 511).

> "This means that we must first of all examine whether and how any legal provision adapts to the factual situation previously clarified. And this adaptation is appreciated not only by the terms of the legal formula, but from everything that may clarify the meaning.
>
> …
>
> Article 1 also does not indicate by what means the judge will penetrate the meaning of the statute, in particular if he will have to research to the bottom the concrete will of the legislature…".

"The legislation does not have to circumscribe (*umschreiben*) what is to be recognized (*Anerkennen*) as customary law (*Gewohnheitsrecht*)", Huber (1914, p. 37) wrote in 1901 in the *Erläuterungen zum Vorentwurf des Eidgenössischen Justiz- und Polizeidepartements*. "That is a matter of science and of practice (*Praxis*)[281]; they are to ensure (*sie sollen dafür sorgen*) that this circumscription can be attained with the requisite clarity". Gény (1919b, p. 317), having quoted Article 1 paragraph 2 ("In default of an applicable legal disposition, the judge pronounces in accordance with customary law..."), said that "[d]espite their generality, these last

[281] In the French text, "That is the office of doctrine and of case-law" (Huber, 1901, p. 30).

words certainly only include the general customs in force (*en vigueur*) in the whole of the Confederation". "As for the customs peculiar to certain cantons, they are valid (*valent*) there according to Article 5 paragraph 1 only for matters in which the legislative competence of the cantons has been maintained, as an exception to the principle of the abrogation *en bloc*[282] of cantonal civil law enshrined in Article 51 of the final title [of the Civil Code] (the entry into force and the application of the Civil Code)". The "subsidiary place assigned to" customary law "necessarily excludes any custom derogating from the statute (*la place subsidiaire, qui lui est assignée, exclut nécessairement toute coutume dérogatoire à la loi*)"[283], Gény (1919b, p. 317) wrote. He added that "although the Code does not define custom, it seems most certain that it does not include judicial usage (*l'usage judiciaire*), which does not offer the traditional characteristics of custom" (Gény, 1919b, p. 318; 1963, p. 512).

"If custom, accepted in the terms which have just been said, is itself missing," Gény (1919b, p. 318; 1963, p. 512) said, "Article 1 opens the door to the discretion of the judge and only assigns, as a direction, that he pronounce 'according to the rules he would establish if he had to act as a legislator'. This is the same idea that, drawing my inspiration from passages of Aristotle and of Merlin [Philippe-Antoine Merlin (30.10.1754 – 26.12.1838)], I proposed in 1899[284], at a time when the preliminary draft of the Swiss Civil Code...had not yet been published" (Gény, 1919b, p. 318; 1963, p. 512). Gény (1919b, p. 78) quoted in the second edition of *Méthode d'interprétation et sources en droit privé positif* the "passage" of Philippe-Antoine Merlin (30.10.1754 – 26.12.1838) that had inspired him (Merlin, 1826, p. 66; 1808, p. 732):

> "...what is the statute (*la loi*) without equity (*l'Équité*)?
>
> ...
>
> However profound a legislator is, it is impossible for him to provide for all the particular cases relating to the statute he publishes; it is necessary that the judges, after having properly penetrated the spirit, find in their equity (*leur Équité*) the supplement to this statute, and that they decide in their own right, as the legislator himself would decide".

[282] "In a block, as a whole", according to the definition in the *Oxford English Dictionary*: http://www.oed.com/view/Entry/61585

[283] « *Même général, le droit coutumier ne peut intervenir, que pour compléter la loi; la place subsidiaire, qui lui est assignée, exclut nécessairement toute coutume dérogatoire à la loi* ».

[284] In the first edition of his book *Méthode d'interprétation et sources en droit privé positif.*

A French translation of the "passage" of Aristotle that had inspired Gény was also quoted in the second edition of *Méthode d'interprétation et sources en droit privé positif* (1919b, p. 78). Aristotle, in Book V of *Nicomachean Ethics*, said that "every law is laid down in general terms, while there are matters about which it is impossible to speak correctly in general terms" (Peters, 1909, p. 175):

> "When, therefore, the law lays down a general rule, but a particular case occurs which is an exception to this rule, it is right, where the legislator fails and is in error through speaking without qualification, to make good this deficiency, just as the lawgiver himself would do if he were present, and as he would have provided in the law itself if the case had occurred to him"[285].

The "object" of Article 5 of the French Civil Code, according to Adolphe Thiers (15.4.1797 – 3.9.1877), was "to prevent" the judge "from constituting himself legislator" (Thiers, 1845, p. 203). It provides: "It is forbidden to judges to pronounce by way of general and regulatory disposition on the causes submitted to them"[286]. Gény (1919b, p. 322) argued that "any difficulty disappears if one notes that the decision freely taken, when necessary, by the Swiss judge, is only valid, even as a legal solution, for the case in which it occurs, so that the authority it enjoys, deprived of the generality that characterizes the legal precept or custom, can not pass for an infringement (*atteinte*) of the separation of powers". Article 1 paragraph 2 "does not make judicial decisions a source of formal law, equivalent to statute or custom, though subsidiary in application..." (Gény, 1919b, p. 318).

Edwin Patterson, professor of law at Columbia University, New York, claimed in 1928 that Hermann Kantorowicz considered Article 1 paragraph 2 of the Swiss Civil Code "too radical". Kantorowicz, Patterson wrote, thought "the judge should be directed to decide in accordance with the rule which *the legislators* would have adopted for this case, if they had thought of it, and only if this be unascertainable, should the judge be allowed to follow his own conscience as legislator" and that "the test should be, what rule ought the judge to adopt as legislator, not what

[285] Or to quote a different translation of this passage from the original Ancient Greek, "all law is universal but about some things it is not possible to make a universal statement which shall be correct" (Brown, 2009, p. 99): "When the law speaks universally, then, and a case arises on it which is not covered by the universal statement, then it is right, where the legislator fails us and has erred by over-simplicity, to correct the omission – to say what the legislator himself would have said had be been present, and would have put into his law if he had known".

[286] « *Il est défendu aux juges de prononcer par voie de disposition générale et réglementaire sur les causes qui leur sont soumises* ».

the individual judge would personally prefer the law to be" (Kantorowicz, 1928, p. 695) (emphasis added).

"The decision of a judge who is acting as a legislator will always appear individual, arbitrary, biased..."[287], Joseph Charmont (15.9.1859 – 19.6.1922) argued in his book *La renaissance du droit naturel* (Charmont, 1910, p. 189).

The French text of Article 1 paragraph 3, "without even, it seems, putting on it the seal of an imperative obligation (*sans même, ce semble, y mettre pour lui le sceau d'une obligation impérative*)…recommends that the judge be inspired by (*s'inspirer des*) the solutions consecrated by doctrine and case-law" (Gény, 1919b, p. 319). Gény (1919b, p. 320) described this as "non-obligatory inspiration…". The "affirmation" in Article 1 paragraph 3 of the Swiss Civil Code that "he adheres to the most authoritative doctrine and case-law (*ch'egli si attiene alla dottrina ed alla giurisprudenza più autorevoli*)" does not "diminish" the freedom of decision of the judge "because one or the other are authoritative to the extent to which the judge is disposed to recognize such", Enrico Catellani (12.6.1856 – 7.1.1945), professor of international law at the University of Padua, Italy, noted in an article in 1908 in the *Rivista di diritto internazionale*[288] (Catellani, 1908, p. 56). What is termed case-law in the Italian and French texts is "tradition (*Überlieferung*)" in the German text (von Overbeck, 1984, p. 988). Tradition is not synonymous with case-law. Although the "bulk of judicial tradition lies, of course, in case-law" *Überlieferung* "comprises also the practice of administrative authorities (which is quite important in fields such as marriage, adoption, guardianship) and usages generally followed, for instance, by merchants", a Swiss jurist explained in an academic article published in English in 1977 (von Overbeck, 1977, p. 697).

"The presence of a statutory gap (*Gesetzeslücke*) is…not to be accepted lightly", the Swiss *Bundesgericht*[289] said in its judgement of 16 March 1948 in BGE 74 II 106, 109:

[287] « *La décision d'un juge qui fait acte de législateur, paraîtra toujours individuelle, arbitraire, partiale…* ».

[288] Review of international law.

[289] Federal Court. In the French and Italian languages, Federal Tribunal (*Tribunal fédéral*; *Tribunale federale*).

> "The exercise of legislative power (*gesetzgebende Gewalt*) by the judges, which in the statute is certainly intended for the extreme emergency (Article 1 ZGB), represents an invasion into (*einen Einbruch in*) the principle of the separation of powers and thus into a fundamental principle of modern democracy. The judge may only therefore proceed to establish (*Aufstellung*) new legal propositions where there is no doubt that a norm can not be taken from the statute. A solution should be found for a new circumstance (*Sachverhalt*) in the way of an analogous application of existing legal prescriptions, so therefore the presence of a statutory gap is regularly (*regelmäßig*) to be answered in the negative, even if in this way the resulting order of things is not the most appropriate. Because expediency alone is for the question of the presence of a statutory gap not a decisive factor".

In its judgement of 21 December 1961 in BGE 87 II 355 the *Bundesgericht* defined a statutory gap (*Gesetzeslücke*) as "the absence (*Fehlen*) of a requisite statutory arrangement because the legislature has neglected to regulate something which he should have regulated. Free judicial law-finding (*freie richterliche Rechtsfindung*) in the sense of Article 1 paragraphs 2 and 3 of of the Civil Code…presupposes the presence of such a gap, and indeed it must…be a material gap in the statute". A statutory gap (*Gesetzeslücke*) "exists only when neither according to its wording nor according to the content ascertained by interpretation a prescription can be taken from the statute and also (*auch*) when no solution can be found by way of analogous application of existing legal propositions", the *Bundesgericht* said in its judgement of 3 May 1974 in BGE 100 Ib 137.

"A genuine statutory gap (*echte Gesetzeslücke*) exists, according to the case-law of the *Bundesgericht*, when the legislature has omitted to regulate something which it should have regulated, and a prescription (*Vorschrift*) can be taken from the statute neither according to its wording nor the content ascertained through interpretation", the Swiss *Bundesgericht* said in its judgement of 25 April 1995 in BGE 121 III 219, 225.

"Even in the case of a statutory gap (*Gesetzeslücke*) it does not become the judge to set up (*aufzustellen*) a general rule whose scope goes beyond the concrete individual case", the *Bundesgericht* said in its judgement of 4 May 1977 in BGE 103 Ia 501.

"Free judicial law-finding (*freie richterliche Rechtsfindung*) in the sense of Article 1 paragraphs 2 and 3 of of the Civil Code…" was researched by the Swiss jurist Arthur Meier-Hayoz (2.6.1922 – 24.6.2003) for his book *Der Richter als Gesetzgeber*[290] (1951). He found that the judges in Switzerland had "clearly indicated their reluctance…to recognize (and especially, to openly recognize)" statutory gaps (Holleaux, 1952, p. 813): "Quite the contrary, even where the silence of the statute, not only in its literal language but even after applying the legitimate processes of interpretation could seem (and seems to doctrine) to justify the deliberate move to free juridical construction (*libre construction juridique*), the nearly constant tendency of the judges has been to try to house (*abriter*) the new solution to a new problem under an appearance, at least, of interpretation of existing law".

Swiss judges have not needed to explicitly recognize statutory gaps to create law.

Hermann Kantorowicz, Eugen Ehrlich, François Gény, Josef Kohler, Oskar Bülow and Eugen Huber are the principal representatives of the free law movement. "The common fundamental trait (*Grundzug*) of all adherents" of the free law movement, Kantorowicz wrote, is "the cognizance (*Erkenntnis*) that judgements actually are not and cannot be merely applications of statutes, and the demand that legal science has accordingly to search for methods in conformity with which the extra-statutory (*außergesetzlichen*), subsidiary sources of law ('free law') are to be treated" (Kantorowicz, 1908d, p. 869-870): "...we want, only, to determine what in reality happens, and render the judge conscious…of the creativeness of his juridical activities (*della creatrice sua attivita giuridica*): and this methodically (*metodicamente*) to render perfect, but *praeter* not *contra legem*!" he said in a letter in 1908 (1908a, p. 22). The free law movement "disputes the *derivability* of all judgements from the statutes (*die* Ableitbarkeit *aller Urteile aus dem Gesetze*), but…insists on their *compatibility* (Vereinbarkeit) with these", Kantorowicz (1908a, p. 77) wrote in 1908. As he said in 1907, the "adherents of the movement…want in the main nothing more than to *state* (konstatieren): that the judge everywhere concludes not only from the statute, but also is and must be *praeter legem* law-creatively active (praeter legem *rechtsschöpferisch tätig*)" (Kantorowicz, 1907, p. 1451).

[290] The judge as legislator.

Chapter 6

Kantorowicz (1937, p. 325) said in 1934 that "every legal concept is vague and lends itself to various constructions" and "every legal rule, no matter whether embodied in decisions or statutes, permits various interpretations". Judges have the power to select between "those constructions and these interpretations…". Discretion has been defined as "the power to select between different courses of action" (Hess, 2003, p. 46). The "discretion" of the judge "may be described as the power of the judge to select between different courses of action" (Hess, 2003, p. 66). "Modern legal theory affirms that almost every application of the law gives some choice to the judge" (Hess, 2003, p. 50). The "exercise" of discretion "entails several dangers, such as subjectivity (because decisions may be influenced by personal value-judgement and temperament of the judge...), inconsistency (because similar cases are decided differently), and a lack of predictability and certainty in the law", Burkhard Hess (2003, p. 48) of the University of Tübingen wrote in a report on "the discretion of judges" written for a colloquium in Ghent in 2000 and published by Kluwer in 2003 in the edited book *Discretionary power of the judge: limits and control*. "Against the excesses of subjectivity the compensating multiplicity of heads in the college of judges (*Richterkollegium*) and the procession of instances (*Instanzenzug*) is sufficient protection", Kantorowicz (1906, p. 41) thought. The representatives of the free law movement were indifferent to the dangers the exercise of discretion entails. Those dangers as they relate to discretion in sentencing in criminal law and the discretion given to the judge by indeterminate concepts in statutes and the use of indeterminate concepts in case-law are explored in this chapter.

"The discretion of a judge is the law of tyrants", Lord Camden, the then Chief Justice of the Court of Common Pleas in England, said in Hindson v. Kersey (1765) 8 How St Tr 57:

> "It is always unknown. It is different in different men. It is casual, and depends upon constitution, temper, passion. In the best it is oftentimes caprice. In the worst it is every vice, folly, and passion, to which human nature is liable".

There are *some* constraints, undoubtedly, on the exercise on discretion by judges. A former Judge of the Court of Appeal of New Zealand, Edmund Thomas, has argued there are both

external constraints and what he terms internalized constraints (Thomas, 2005, p. 243-248). He identifies as the external constraints on the exercise of discretion "the structure of the legal system"[291], the obligation to provide reasoned judgements, the legal education of judges and the criticism of their judgements by lawyers and academics (Thomas, 2005, p. 243-245). An American federal judge, Richard Posner[292], makes the point that between different legal systems "there are major differences in the external constraints" on judges (Posner, 2010, p. 126). He regards "public opinion" as an external constraint but also considers it "one of the most problematic of external constraints on judges" because judges "are supposed to ignore it" (Posner, 2010, p. 274). Like Thomas (2005, p. 245), Posner (2010, p. 204) sees "academic criticism" as an "external constraint" on the behaviour of judges. The internalized contraints, according to Thomas (2005, p. 245-248), are those constraints internalized by the judge as a result of his or her "membership of an institution". The extent to which these are internalized is debateable and even if internalized they are arguably influences on the judge rather than substantial limitations. Posner (2010, p. 125), described "as 'internal' contraints" (a) the concern a judge has for "their reputation *among people…they respect*" and (b) "their having internalized the norms and usages" of "judicial" activity (emphasis added). Aharon Barak (2005, p. 210-211), a former President of the Supreme Court of the State of Israel, has written that the discretion of judges "is subject to both procedural and substantive restrictions". The procedural restrictions "require the exercise of judicial discretion to be fair":

> "Judges must act without bias. They must treat the parties equally. They must make decisions based on the evidence presented. They must explain their decisions. They must act objectively".

These are arguably obligations rather than restrictions or limitations. "The substantive limitations[293]", for Barak (2006, p. 147), are that the judge "must act reasonably, taking into account the institutional constraints imposed by other parts of the legal system". The judge "must take into account the existence of the system and the need for a solution that integrates into it" and must also "consider institutional limitations" (Barak, 2005, p. 211).

[291] For example, "the fact that judges operate in a…hierarchy…" (Thomas, 2005, p. 18).

[292] Posner is a Judge of the United States 7th Circuit Court of Appeals.

[293] He used the term "limitations" in a book published in 2006 and the term "restrictions" in the other book quoted.

"The definitive ascertainment of the law to be applied can only be effected by volitional decisions (*Willensentscheidungen*), which are close to the volitional acts (*Willensakten*)[294] by which the legislature creates new law", Gustav Rümelin (1.5.1848 – 11.6.1907), "one of the precursors" of the free law movement (Gény, 1919b, p. 353), argued in *Werturteile und Willensentscheidungen im Civilrecht*[295] (1891). Rümelin wrote (1891, p. 22) that "in the field of civil law value-judgements and volitional decisions based on them occur on a large scale (*auf dem Gebiet des Civilrechts in grossem Umfang Werturteile und auf diesen beruhende Willensentscheidungen vorkommen*)…". This is also true in the "field" of criminal law, as Franz von Liszt (2.3.1851 – 21.6.1919) acknowledged in his article *Die deterministischen Gegner der Zweckstrafe*[296] (1893, p. 365):

> "*Nulla poena sine lege*[297] means the statutory determining of the content and extent (type and quantity) of the punishment to be applied in the individual case. This proposition which, carried out consistently, demands absolute threats of punishment exclusively, is in our current legislation already breached. The criminal codes of the present leave your judge, apart from in the rarest exceptional case, choice between a great number of quantities of punishment, usually also between two or more types of punishment. Within the statutory range of punishments the judge, and not the statute, determines the punishment".

"The proposition that any punishment presupposes a criminal statute comes from Beccaria[298] [Cesare Beccaria (15.3.1738 – 28.11.1794)], Feuerbach [Paul Anselm von Feuerbach (14.11.1775 – 29.5.1833)] has given it its present form", Ehrlich (1917c, p. 272) explained. "A correct criminal judgement is…at least with reference to the question of punishability

[294] The compound word *Willensakt* was translated as "act of volition" at p. I-3720 of the English language version of the report of the Judge-Rapporteur, Gil Carlos Rodríguez Iglesias, in Case C-10/89, SA CNL-Sucal NV v. Hag GF AG [1990] ECR I-3711. (German was the procedural language.) *Willensakt* can also be translated as act of will.

[295] Value-judgements and volitional decisions in civil law.

[296] The deterministic opponents of purposive punishment.

[297] No punishment without a statute.

[298] Beccaria, in his book *Dei delitti e delle pene* (1764), had argued that "*every punishment...must be...dictated by the statutes* (ogni pena...dev'essere...dettata dalle leggi)" (Beccaria, 1854, p. 83).

(*Strafbarkeit*), in reality, as Beccaria demanded…*un sillogismo perfetto*[299], in which the statute (*Gesetz*) forms the major premise, the criminal act (*Straftat*) the minor premise, the verdict the conclusion" (Ehrlich, 1917c, p. 344). "In every delict (*delitto*) a perfect syllogism must be made by the judge", Beccaria (1854, p. 11) had said in section 4 of *Dei delitti e delle pene* (1764): "…the major premise must be the general statute; the minor premise, the action conforming, or not, to the statute; the consequence, freedom or punishment"[300]. *Nulla poena sine lege*[301] is the form von Feuerbach (1812, p. 22) gave to this principle.

In Germany today the Criminal Code states that a sentence for theft (*Diebstahl*) can vary from a small fine to imprisonment for ten years[302] (Bundesministerium der Justiz, 2012a, p. 109). The sentence for negligent killing (*Fahrlässige Tötung*) can range from a fine to imprisonment for a maximum of five years[303] (Bundesministerium der Justiz, 2012a, p. 102). A fine or imprisonment for up to five years is also the sentence range specified for bodily injury (*Körperverletzung*)[304] in the German Criminal Code (Bundesministerium der Justiz, 2012a, p. 102) and damage to property (*Sachbeschädigung*) can be punished by a fine or imprisonment for up to two years[305] (Bundesministerium der Justiz, 2012a, p. 127).

Thomas Weigend (1991, p. 628), professor of criminal law and criminal procedure at the University of Cologne, in an article on "discretion in sentencing", wrote:

> "Most legal systems grant the sentencing judge (practically) unlimited freedom to choose among a vast array of dispositions in any given case. Legal standards guiding their decision-making are typically non-directive, vague, or non-existent".

Their decisions are volitional decisions.

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[299] A perfect syllogism.

[300] "*In ogni delitto si deve far dal giudice un sillogismo perfetto: la maggiore dev'essere la legge generale; la minore, l'azione conforme, o no, alla legge; la conseguenza, la libertà o la pena*".

[301] No punishment without a statute.

[302] See Sections 242 and 243 of the German Criminal Code (*Strafgesetzbuch*, abbreviated StGB).

[303] § 222 StGB.

[304] § 223 StGB.

[305] § 303 StGB.

The legislature of the Union "may now prescribe in a directive that a particular norm must be enforced at national level by means of [national] criminal law", the President of the *Hoge Raad der Nederlanden*[306], Geert Corstens, noted in a speech on 9 December 2010 on "criminal justice in the post-Lisbon era" (Corstens, 2010, p. 3). The "use" of criminal law "may be prescribed...in areas where the EU is competent"[307] and Union legal norms "enforced at national level by means of [national] criminal law" are "enforced" by the judges of the national courts.

Article 67 paragraph 3 of the Treaty on the Functioning of the European Union (OJ C 83, 30.3.2010, p. 73) provides for the "mutual recognition" of decisions in criminal cases (*die gegenseitige Anerkennung strafrechtlicher Entscheidungen*; *la reconnaissance mutuelle des décisions judiciaires en matière pénale*) and Article 82 paragraph 1, which refers to the "principle of mutual recognition of judgements and judicial decisions (*dem Grundsatz der gegenseitigen Anerkennung gerichtlicher Urteile und Entscheidungen*; *le principe de reconnaissance mutuelle des jugements et décisions judiciaires*)" states that the European Parliament and the Council of the European Union "shall adopt measures to…lay down rules and procedures for ensuring recognition throughout the Union of all forms of judgments and judicial decisions (*aller Arten von Urteilen und gerichtlichen Entscheidungen*; *toutes les formes de jugements et de décisions judiciaires*)…" (OJ C 83, 30.3.2010, p. 79-80). How are sentences in criminal cases – sentences that will be "recognized" in the whole Union (*in der gesamten Union*; *dans l'ensemble de l'Union*) – determined by the judges of the national courts? The "judicial authorities" in the member states "*and also…the general public*…must" have "confidence…that that giving effect to judicial decisions made in other member states will not result in injustice or unfairness", the Sub-Committee on Justice and Institutions of the UK House of Lords Committee on the European Union said in a report published on 26 April 2012 on the criminal policy of the Union (House of Lords Committee on the European Union, 2012, p. 14) (emphasis added). Do the volitional decisions of judges merit such "confidence"?

Is it even "necessary", as Hess (2003, p. 48) claimed it is, for judges to have the discretion they possess? The *Code pénal* of 25 September 1791 of the French Republic eliminated the discretion of judges in sentencing in criminal cases. It "limited…the mandate of the judge...to ruling on culpability, but without having any share of influence over the scale of the sentence (*le tarif de la peine*) (Jarno, 1895, p. 10; 1901, p. 10): "Once culpability was recognized, the sentence, pronounced by the statute, was incurred, identical and uniform for all cases and for all

[306] High Council of the Netherlands. The *Hoge Raad der Nederlanden* is "the highest court in the Netherlands in the fields of civil, criminal and tax law" (Hoge Raad der Nederlanden, *n. d.*).

[307] On the "areas of Union competence" see Articles 2, 3, 4 and 6 of the Treaty on the Functioning of the European Union (OJ C 83, 30.3.2010, p. 50-53).

offenders...". The "system of fixed, invariable sentences" of the *Code pénal* of 25 September 1791 (Saleilles, 1898, p. 54; 1909, p. 55) was, according to Clément-Louis-Marie Jarno (15.3.1846 – 30.3.1920), professor of the history of French law at the University of Rennes, adopted by the French Constituent Assembly in view of "the former arbitrariness of sentences and of the abuses which had been the result…".

Richterliches Ermessen – discretion of the judge – was the original marginal title (*Randtitel*) of the German text of Article 4[308] of the Swiss Civil Code of 10 December 1907, which provides as follows:

> "Where the statute refers the judge to his discretion or to appreciation of the circumstances or to weighty grounds, he has to make his decision in accordance with right and equity (*nach Recht und Billigkeit*; *secondo il diritto e l'equità*)"[309].

This legal proposition was not in the preliminary draft (*Vorentwurf*; *avant-projet*) of the Swiss Civil Code edited by Eugen Huber and published in German and French on 15 November 1900. It was introduced, in its original form, as Article 5 of the draft (*Entwurf*; *projet*) of 28 May 1904 published in German in the *Schweizerisches Bundesblatt* on 15 June 1904[310] (BBl. 1904, IV, 1)

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[308] In 2000 the marginal title was amended to *Gerichtliches Ermessen* – discretion of the court – and the German text of the Article correspondingly amended: „*Wo das Gesetz* das Gericht *auf sein Ermessen oder auf die Würdigung der Umstände oder auf wichtige Gründe verweist, hat* es *seine Entscheidung nach Recht und Billigkeit zu treffen*" (emphasis added). The Italian and French texts have not been amended. *Apprezzamento del giudice* is the marginal title of the Italian text; in the French text *Pouvoir d'appréciation du juge* is the marginal title. On the amendment of the German text see Schindler (2007, p.134).

[309] „*Wo das Gesetz den Richter auf sein Ermessen oder auf die Würdigung der Umstände oder auf wichtige Gründe verweist, hat er seine Entscheidung nach Recht und Billigkeit zu treffen*" (BBl. 1907, VI, 589). "*Il giudice è tenuto a decidere secondo il diritto e l'equità quando la legge si rimette al suo prudente criterio o fa dipendere la decisione dall'apprezzamento delle circostanze, o da motivi gravi*" (Diener, 1921, p. 78; Le autorità federali della Confederazione Svizzera, 2013). « *Le juge applique les règles du droit et de l'équité, lorsque la loi réserve son pouvoir d'appréciation ou qu'elle le charge de prononcer en tenant compte soit des circonstances, soit de justes motifs* » (FF 1907, VI, 429).

[310] „*Wo das Gesetz den Richter auf sein Ermessen oder auf die Würdigung der Umstände oder auf wichtige Gründe verweist, hat er seine Entscheidung nach der Regel zu treffen, die den vorliegenden Verhältnissen nach Recht und Billigkeit am besten entspricht*".

and in French in the *Feuille fédérale suisse* on 16 June 1904[311] (FF 1904, IV, 1). "Article 5 should point out (*soll darauf hinweisen*) that appeal to judicial discretion (*richterlichen Ermessens*) and the like may never signify an approbation of judicial arbitrariness (*richterlicher Willkür*)"[312], the Federal Council said in its message to the Federal Assembly on the draft (BBl. 1904, IV, 1, 14). The insertion of this legal proposition proceeded "from a fear *in extremis* by the legislature in the face of the large number of provisions which referred to the appreciation of the judge (*l'appréciation du juge*)" and, "by the insertion of Article 4, it was intended that the judge not let himself be guided by his personal appreciation...", according to Henri Deschenaux (2.9.1907 –) of the University of Fribourg; it "signifies that he must not submit to sentiment, commiseration, mood or to fancy" (Deschenaux, 1970, p. 31; 1969, p. 124).

"The expression 'right and equity' (*droit et équité*; *Recht und Billigkeit*) is a 'hendiadys'[313] ", Deschenaux (1970, p. 31; 1969, p. 124) wrote:

> "It is the equivalent of 'equitable right' (*droit d'équité*; *billiges Recht*). It means that into the void left by the legal rule the judge must (*doit*) bring considerations of material justice. The legislature renounces determining all of the factors which may play a role in the particular case; it charges the judge to do so in its place".

In its judgement of 16 January 1989 in BGE 115 II 30 the Swiss *Bundesgericht* said that it will review an equitable decision (*Billigkeitsentscheidung*) under Article 4 "only with restraint and will only intervene if principles of assessment identified in doctrine and case-law are groundlessly departed from, if facts are considered which for the decision in the individual case ought to have played no role, or conversely if circumstances which need to be noted are left out of consideration". The *Bundesgericht* "additionally intervenes in discretionary decisions if these prove to be manifestly inequitable (*offensichtlich unbillig*), to be in exceptionable (*stossender*[314]) ways unjust", it said.

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[311] « *Le juge dont la loi réserve le pouvoir d'appréciation, ou qu'elle charge de prononcer en tenant compte soit des circonstances, soit de justes motifs, appliquera les règles du droit et de l'équité qui répondront le mieux aux faits de la cause* ».

[312] „*Art. 5 soll darauf hinweisen, daß die Anrufung des richterlichen Ermessens und ähnliches niemals eine Gutheißung richterlicher Willkür bedeuten darf*".

[313] Hendiadys is "the expression of a single idea by two words connected with 'and'..." (Concise Oxford English Dictionary, 11th ed., p. 665).

[314] A Swiss German term.

"It is incompatible with the natural sense of what is right (*dem natürlichen Rechtsgefühle*) that someone retains unchallenged what he obtained through an unlawful act and through the same has deprived in his rights the injured person"[315], the German *Reichsgericht* held in its decision of 28 December 1899 in RGZ 45, 170, 173. "What is this natural sense of what is right (*natürliche Rechtsgefühl*)…", Rudolf Stammler asked in 1902 in his book *Die Lehre von dem richtigen Rechte* (Stammler, 1902, p. 146):

> "One might answer that it is one's highly personal feeling of what should be law; a subjective opinion concerning a demanded legal norm (*das höchst persönliche Empfinden jemandes über das sei, was Recht sein sollte; ein subjektives Meinen über eine zu fordernde rechtliche Norm*). However in that judgement it indeed appears in the grounds (*Gründe*) of the decision. The Court relies on it to prove something. It leads the thoughts of the readers there, to persuade them of the correctness of the deliberations: thus is meant an objectively valid mode of considering legal matters".

„*Das Rechtsgefühl! – Als ob's ein andres noch / In einer andern Brust, als dieses, gäbe!*"[316], one of the characters protests in the play *Die Familie Schroffenstein* (1803) by Heinrich von Kleist (18.10.1777 – 21.11.1811) (Tieck, 1826, p. 8; Herzog, 1908, p. 11).

Stammer (1923a, p. 638), in an article published in in 1923 on *Die grundsätzlichen Richtungen der neueren Jurisprudenz*[317], described the sense of what is right as "a subjective feeling" and criticized as "not thoroughly reasoned" the decision of the *Reichsgericht* in RGZ 45, 170; its decision was, he said, based on the ground that "the opposite conclusion would be contrary to the 'natural sense of [what is] right'[318] (*natürliche Rechtsgefühl*)". He wrote (Stammler, 1923a, p. 639):

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[315] „*Es ist mit dem näturlichen Rechtsgefühle unvereinbar, daß jemand das unangefochten behalte, was er durch eine widerrechtliche Handlung erlangt und dem durch dieselbe in seinen Rechten Verletzten entzogen hat*".

[316] "The sense of what is right! – As though there were another / In another breast, than mine!" (Graham, 1977, p. 48).

[317] This article was translated into English and published in 1923 in the *Michigan Law Review*. It was published in German in 1925 in volume 2 of the collection *Rechtsphilosophische Abhandlungen und Vorträge*.

[318] The translators of this article translated *Rechtsgefühl* as "sense of right".

> "…the often-asserted natural sense of [what is] right (*natürliche Rechtsgefühl*) is nothing else than a chance and haphazard notion and estimate of right. And this appeal to a natural sense of [what is] right (*natürliche Rechtsgefühl*) presupposes anyhow the underlying concept of *the fundamentally right*. It is, in substance, simply this: within me rules an inexplicable power whence I derive judgements of a fundamentally just character".

Both in 1902 and again in 1923, in the works quoted above, Stammler referred to the decision of 28 December 1899 of the *Reichsgericht* in RGZ 45, 170. The context and the facts of the case are interesting and should be explained. Otto von Bismarck, the eighty-three year old former Reich Chancellor, died at 22:57 on 30 July 1898 at his estate in Friedrichsruh (Kohl, 1899, p. 384; Penzler, 1898, p. 491; von Wertheimer, 1926, p. 257). Wilhelm Wilcke, a photographer, and his assistant Max Christian Priester "had already gone in the morning on foot to Friedrichsruh with the intention of making a photographic record of the death-chamber and of the deceased…" (Photographische Correspondenz, 1899a, p. 245). They had received "a tip-off from a servant" at the estate, Louis Spörcke (The Indian Express, 1998, p. 2). Wilcke and Priester secretly entered the ground-floor bedroom in which Bismarck's body lay by climbing through a window opened for them by Spörcke. Bismarck had been dead for five hours but Wilcke and Priester "altered his bedside clock to show the time of 23:20" (The Indian Express, 1998, p. 2), "patted down the pillows and shifted Bismarck's corpse, moving his bandaged head so his face would be more visible" (The Indian Express, 1998, p. 1) and then photographed the body (Klang, 2005, p. 176)[319]. Wilcke and Priester went to Berlin and attempted to sell the photographs. They placed advertisements in two Berlin newspapers. Bismarck's son Herbert, however, contacted the Berlin Police Presidium, "which carried out a provisional seizure of the plates and pictures" (Photographische Correspondenz, 1899a, p. 246).

At the request of Bismarck's children a temporary injunction was issued on 5 August 1898 "under which, in addition to confiscation of the existing [photographic] plates and all equipment," Wilcke and Priester were "prohibited from using in any way for the purpose of distributing the photographs, the plates, plate prints and negatives of the photographs taken of the corpse of Prince Bismarck and everything pertaining thereto and from in any way distributing or exploiting the prints already made" (Photographische Chronik, 1898, p. 409). The *Landgericht* Hamburg then had to decide whether the temporary injunction of 5 August

[319] One of those photographs was published in the German news magazine *Der Spiegel* on 6 July 1998 (Machtan, 1998, p. 81).

1898 had been "rightfully issued"[320]; in its judgement of 8 September 1898 it held (Photographische Chronik, 1898, p. 410-411):

> "Anyone who depicts (*abbildet*) without permission someone else with the intention of bringing the picture into the public sphere violates the rights of personality of this other in any case when the other has an interest in the picture not getting into the public sphere. For this reason, in such a case even the making of the picture would be contrary to law (*rechtswidrig*), even if the picture had been made in the mistaken belief that the making of the picture and its subsequent distribution had been approved or at least soon would be approved.
>
> ...
>
> Images of persons who belong to history or have stepped forward in public life will not be objected to, as a rule in any case, if in the making the picture either the personality concerned entered the public sphere or the portrayed personality was not used directly as a model but the reproduction is made according to already familiar images. (Cf. the different views on this in Keyßner, *Das Recht am eigenen Bilde*, p. 14ff., Berlin, J. Guttentag.)
>
> ...
>
> ...according to the foregoing remarks the living would be protected against such rights-violations (*Rechtsverletzungen*), so that even after his death the right to object against unauthorized depiction and against unauthorized distribution of images of the deceased will be ascribed to his closest relatives. This right is not available to them as heirs in the legal sense but as family members of the deceased, since in this capacity they are themselves directly affected by such actions. It is as a rule an intrusion on the rights of personality of the bereaved, because a violation of the sense of reverence, when one undertakes without their consent to make a picture of their dear departed to hand it over to the public sphere".

[320] The order was "apparently issued on the basis of Section 814 of the Code of Civil Procedure (*Civilprozeßordnung*)", the *Landgericht* Hamburg said in its judgement of 8 September 1898. Section 814 of the Code of Civil Procedure read: "Temporary injunctions in respect of the subject of the dispute are permissible if there is reason to believe that by a change in the existing situation the realization of the right of a party could be thwarted or be made considerable more difficult (*Einstweilige Verfügungen in Beziehung auf den Streitgegenstand sind zulässig, wenn zu besorgen ist, daß durch eine Veränderung des bestehenden Zustandes die Verwirklichung des Rechts einer Partei vereitelt oder wesentlich erschwert werden könnte*)" (Seuffert, 1895, p. 1011).

The temporary injunction was upheld (Photographische Chronik, 1898, p. 409). The *Landgericht* Hamburg cited in its judgement *Das Recht am eigenen Bilde* (1896)[321], a book by Hugo Keyßner (17.11.1827 – 4.9.1905) and Keyßner stated in an article in *Deutsche Juristen-Zeitung* on 1 December 1898 that "the same principles" he had "developed" in his book had "found recognition (*Anerkennung*)" in the judgement of 8 September 1898 (Keyßner, 1898, p. 486). "The significance of this decision lies in the resolve to protect against the taking of a picture (*Bildnisentnahme*) of the deceased", Keyßner wrote:

> "My concern is with whether in the taking of a picture an intrusion on the rights of personality (*Rechte der Persönlichkeit*) of the bereaved can be found and felt. If the unauthorized taking of a picture of the dead Prince von Bismarck is described as infringement (*rechtsverletzend*) and protection was granted by an interim injunction issued against the photographers, this corresponds to the sense of what is right of the people (*dem Rechtsgefühl des Volkes*)...
>
> …
>
> Through the authorized talking of a picture the personality of Prince von Bismarck has been injured, the protection of which his children have asked for and found. I am glad of that.
>
> The protected right extends far beyond the statutory text. It is the task of the judge to find the law. The legislature may shape (*gestalten*) the law, the judge must not wait in law-finding until the legislature has paved the way for him. The *Landgericht* Hamburg did not wait, but found the law (*das Recht gefunden*)".

The decision of 28 December 1899 of the *Reichsgericht* in RGZ 45, 170 "was related to a bankruptcy question (since [Wilcke and Priester] were insolvent): were the negatives part of their estate?" (Markesinis & Unberath, 2002, p. 76). As the German Civil Code has not yet entered into force the case had to be decided under the *usus modernus pandectarum*[322]. "Roman law, the Reichsgericht observed, "granted to the person injured by an act contrary to law (*rechtswidrige Handlung*) a *condictio ob injustam causam* for the restitution (*Wiedererstattung*) of everything which through that act passes from his sphere of power into the control of the perpetrator". "By this is of course in the first instance meant only corporeal things (*körperliche*

[321] The right to one's own image.

[322] Modern use of the pandects, i.e., of the Justinian *Digesta*. The *usus modernus pandectarum* was "an amalgamation of Roman law with the old local customs, in which Roman law, being more comprehensive and elaborate, was the dominating element" (Schlesinger, 1970, p. 214).

Sachen)…be it that the property right to the things (*Eigentumsrecht an den Sachen*) or at least possession as by wrongful deprivation (*widerrechtliche Entziehung*) appears violated (*verletzt*)"[323], the Reichsgericht said in RGZ 45, 170, 173. The *Reichsgericht*, however, analogously applied (*entsprechende Anwendung*) this condiction[324] to "the effective deprivation contrary to law (*widerrechtliche tatsächliche Entziehung*) of other powers (*Machtbefugnisse*) and appropriation of the corresponding advantages" (RGZ 45, 170, 174)[325].

The provisions in Section 22 and Section 23 of the German *Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie*[326] of 9 January 1907 (RGBl. 7) regarding the publication of photographic images of persons "can be traced back to an offensive incident (images of Bismarck on his deathbed, cf. RGZ 45, 170) and the subsequent discussion on legal policy…", the *Bundesverfassungsgericht* confirmed in its decision of 15 December 1999 in 1 BvR 653/96, BVerfGE 101, 361[327]. Section 22 of the *Gesetz betreffend das Urheberrecht an Werken der bildenden Künste und der Photographie* provides as follows:

> "Images may be distributed or presented for public display only with the consent of the subject. In case of doubt, the consent is deemed to have been granted when the subject receives a payment for allowing the images to be made. After the death of the subject and until the expiration of 10 years, the consent of the subject's relatives is required...".

Under Section 23 paragraph 1 the following images "may be distributed and presented for display (*verbreitet und zur Schau*) without the consent required by Section 22":

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[323] „*Dabei ist freilich zunächst nur an körperliche Sachen die aus dem Vermögen des Beeinträchtigten herrühren, gedacht, sei es daß das Eigentumsrecht an den Sachen, oder daß wenigstens der Besitz als durch widerrechtliche Entziehung verletzt erscheint*".

[324] "A formal claim of restitution…" is the definition of the noun "condiction" in the *Oxford English Dictionary*: http://www.oed.com/view/Entry/38529

[325] „*Aber dies mich entsprechende Anwendung finden auf die widerrechtliche tatsächliche Entziehung anderer Machtbefugnisse und Aneignung der entsprechenden Vorteile*".

[326] Statute concerning the copyright of works of visual art and photographic works.

[327] An English translation of the judgement is available on the website of the *Bundesverfassungsgericht*: http://www.bundesverfassungsgericht.de/entscheidungen/rs19991215_1bvr065396en.html

1. "Images from the sphere of contemporary history".
2. "Pictures in which the subjects appear only as part of the backdrop in a landscape or other locality".
3. "Pictures of assemblies, demonstrations and similar events in which the depicted individuals have taken part".
4. "Images, though not produced by request, in so far as the distribution or display serves a higher interest of art".

Section 23 paragraph 2 provides that the "authority" to distribute and display the images listed in Section 23 paragraph 1 "does not, however, extend to a distribution and display by which the subject, or in the case the subject is dead, his relatives, suffers an injury to a legitimate interest".

Rechtsgefühl has been portrayed "the result of a process of identification…" (Bihler (1979, p. 101). This identification is a psychological identification with one or other "interest positions" (Rehbinder, 1982, p. 3). Dubber (1993 p. 1819-1820) claimed that the "adherents" of the free law movement "urged judges to shed the chains of positivism and interpret positive law in accordance with their *Rechtsgefühl*"[328]. He cited the book *Rechtsnorm und Entscheidung* (1929) by Hermann Isay (7.9.1873 – 21.3.1938)[329]. It was, however, conclusively demonstrated in a study published in 1975 that it is "certainly false" to regard Hermann Isay as an "exponent" of the free law doctrine (Roßmanith, 1975, p. 118-119). Isay was not one of the "adherents" of the free law movement.

"The foundation for Isay's entire theory of law is…the sense of what is right (*Rechtsgefühl*)" (Roßmanith, 1975, p. 59). *Rechtsgefühl* is for Isay (1929, p. 5) "the source..., which alone [can] create (*erzeugen*) law", the "sole definite foundation of law". "The sense of what is right (*Rechtsgefühl*), as immediately directed to values and to actions and conditions (*Zuständlichkeiten*) as bearers of values, can in its essence only be made discernible, not definable" (Isay, 1929, p. 92). It "reacts directly only in decisions" (Isay, 1929, p. 185) and "*Rechtsgefühl* and practical reason" are, Isay asserted, "the foundations of decision-making…" (Roßmanith, 1975, p. 79). Roßmanith (1975, p. 70) summarized Isay's theory as follows:

[328] Dubber mistranslated *Rechtsgefühl* as "sense of justice", which in German is *Gerechtigkeitsgefühl*. *Rechtsgefühl* is the "sense of what is right" (Kaufmann, 1970, p. 25).

[329] Specifically, pages 85 and 86 of Isay's book.

> "Law is 'felt' by the individual judge with the sense of what is right (*Rechtsgefühl*), not created by public and parliamentary discussion. In the *Rechtsgefühl* an absolute, transpositive order of values is given, which constitutes the substance of law. The state can only formulate law, not create. The statutes of the state only have validity and can only be binding when they accord with the *Rechtsgefühl* of the deciding judge".

"One can from any norm derive the just as the unjust decision perfectly logically in the same manner", Isay (1929, p. 162) contended. "From the failure of a theory of rational decision-making Isay however immediately draws the conclusion regarding the necessity of the complete irrationality of the decision. A theory for rational decision-making is for him not possible any more" (Roßmanith, 1975, p. 77).

The views of Isay and the representatives of the free law movement "differ…on fundamental questions" (Roßmanith, 1975, p. 122). Isay "generally" referred to the free law movement "only to point out what he recognized as their errors and inadequacies and to distance himself from them. He never identif[ied] himself with their views, but on individual points he follow[ed] individual representatives of the free law movement"; in his preface to *Rechtsnorm und Entscheidung* Isay explained that he was presenting "a methodologically and substantively new and independent theory of law and of law-finding" (Roßmanith, 1975, p. 121): "Isay by no means understood his theory as a summary and systemization of free law ideas, nor as their renewal or development". The question of gaps in formal law was irrelevant to Isay (Roßmanith, 1975, p. 122):

> "Statutes, customary law and all other norms are for Isay not to a greater or lesser extent incomplete, but generally not in a position to prescribe decisions.
>
> The free law doctrine holds firmly to the derivation of decisions from norms. To the extent that definite statutory provisions exist, the judge has to follow them. Even where the formal law has gaps…the judge should decide on the basis of norms, namely those of the (still) not formalized 'free law' and those which he makes himself in accordance with…Article 1 of the Swiss Civil Code.
>
> Isay, however, contends that the decision never arises by derivation from norms, these only follow subsequently, and held the judge empowered to ignore statutory provisions. In this Isay himself sees the decisive contrast to the free law doctrine".

Roßmanith (1975, p. 125) concluded that Isay was, "according to his self-conception, not a free law jurist and the content of his theory cannot be attributed to the free law movement".

In its judgement of 17 March 1969 in BGHZ 52, 17, 20 the German *Bundesgerichtshof* defined the concept of "good morals" in Section 138 paragraph 1 of the German Civil Code and Section 826 of the German Civil Code as the "sense of what is right of all fair and just-thinking people (*Rechtsgefühl aller billig und gerecht Denkenden*)" (Rehbinder, 1982, p. 2). Section 138 paragraph 1 of the German Civil Code provides: "A legal transaction that offends against good morals (*guten Sitten*) is null" (Riesebieter, 1907, p. 39; Bundesministerium der Justiz, 2010, p. 24). Section 826 of the German Civil Code provides: "Anyone who in a manner offending against good morals (*guten Sitten*) intentionally causes harm to another is obliged to compensate the other for the harm caused" (Riesebieter, 1907, p. 253; Bundesministerium der Justiz, 2010, p. 115). The concept of "good morals (*gute Sitten*)" is an "indeterminate" concept (Ehrlich, 1917c, p. 354) and what offends against good morals is left to the discretion of the judge. How has this concept been interpreted in Germany? "The object of Section 826 of the Civil Code is to prevent, in the interests of ordinary economic and legal intercourse, unfair conduct intended to injure third persons", the *Reichsarbeitsgericht*[330] said in its judgement 26 January 1929 in RAGE 3, 140 (International Labour Office, 1930, p. 201-202):

> "…the view as to what in specific cases is morally right or morally reprehensible changes according to the times. However, one must not forget that the provision of Section 826 of the Civil Code does not constitute a moral law but a legal rule laying down a legal duty. According to that legal duty it is not such conduct as runs counter to a noble way of thinking and to a particularly developed conception of honour and decency which creates the duty of compensation, but only such conduct as is regarded as inadmissible and morally reprehensible in the social circle of the person in question. The view of these circles is relevant for judging acts committed by employers or employees during or in pursuance of labour disputes.
>
> …the appropriate standard for gauging the morality or immorality of an action in the sense described above can be gained only by means of a comprehensive picture which the judge obtains by considering the motives of the person causing the injury, his objects, and the means used for achieving them".

[330] Reich Labour Court.

"The concept of an 'offence against good morals' (*'Verstoßes gegen die guten Sitten'*), as contained in Section 138 and in Section 826 of the Civil Code, receives its essence from the content of the prevailing popular feeling (*Volksempfinden*) since [1933], the National Socialist *Weltanschauung*[331]", the *Reichsgericht* said in its judgement of 13 March 1936 in RGZ 150, 1, 4. "Filled with this content, Section 138 is also to be applied to outstanding transactions from the earlier period". "If a contract according to *the now authoritative view* contravenes against good morals, it may not be granted any legal protection by a German court", the *Reichsgericht* held (emphasis added).

"A legal transaction is null under Section 138 paragraph 1 of the Civil Code if it cannot be reconciled (*nicht zu vereinbaren*[332]) with good morals according to its total character, to be deduced from the combination of content, motive and purpose", the German *Bundesgerichtshof* said in its judgement of 19 January 2001 in BGHZ 146, 298 (Markesinis, 2007):

> "Neither consciousness of the immorality nor an intention to harm is necessary here; instead it suffices if the person acting knows the facts from which the immorality follows. It makes no difference whether someone closes his mind to the knowledge of pertinent facts (*erheblicher Tatsachen*[333]) deliberately or with gross negligence".

The concept of misuse of rights (*Rechtsmissbrauch*)[334] is also "indeterminate".

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[331] World-view or view of the world.

[332] Is not compatible.

[333] Significant facts.

[334] In the English language versions of the judgements of the Court of Justice and the opinions of the Advocates General the compound word *Rechtsmissbrauch* is almost without exception translated as "abuse of rights" but in the English translation published in 1915 of the Swiss Civil Code, which was "corrected and revised" by Eugen Huber and Alfred Siegwart (20.8.1885 – 29.8.1944) (Smithers, 1915, p. vi), the term *Missbrauch* is translated as "misuse" (Shick, 1915, p. 1). Dutch was the procedural language in Case 140/77 Verhaaf v. Commission of the European Communities [1978] ECR 2117 and *misbruik van recht* was respectively translated as *Rechtsmißbrauch* and "misuse of rights" in the German and English language versions of the judgement of 9 November 1978 of the Court of Justice. On the European Union's EuroVoc website (http://eurovoc.europa.eu/) "misuse of a right" is the English translation of *Rechtsmissbrauch* and *abus de droit* (Publications Office of the European Union, 2013). The English noun abuse "has developed a sinister violent meaning, 'maltreatment or (especially sexual) assault of a person' " and "its older meaning, 'misuse or improper use', has been greatly extended in explicit combinations such as alcohol abuse, drug abuse, heroin abuse, solvent abuse, steroid abuse, substance abuse, etc. , all associated with harmful or narcotic substances" (Allen, 2008, p. 10). For these reasons *Rechtsmissbrauch* and *abus de droit* have been translated by the author as "misuse of rights" and not "abuse of rights".

Ehrlich (1913, p. 140) realized that the "legal propositions on the misuse of a right (*Mißbrauch eines Rechts*)...allow the judge an almost unlimited freedom". In Union law the prohibition of misuse of rights (*Rechtsmissbrauchsverbot*) is not a legal proposition (*Rechtssatz*) but it is, Advocate General Eleanor Sharpston said in paragraph 58 of the German language version of her opinion of 8 July 2010 in Case C-303/08 Bozkurt v. Land Baden-Württemberg [2010] ECR I-13445, undoubtedly a general principle of Union law[335]. It is a creation of the case-law of the Court of Justice (Lenaerts, 2010, p. 1123). "The open misuse (*Missbrauch*) of a right finds no legal protection (*Der offenbare Missbrauch eines Rechtes findet keinen Rechtsschutz*)"[336], Article 2 paragraph 2 of the Swiss Civil Code provides (Schweizerisches Bundesblatt 1907, VI, 590; Shick, 1915, p. 1). What constitutes *Missbrauch*?

"According to the case-law of the Court, Community law cannot be relied on for abusive …ends…", the Court of Justice stated in paragraph 20 of its judgement of 12 May 1998 in Case C-367/96 Alexandros Kefalas and others v. Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE) [1998] ECR I-2843. (Advocate General Guiseppe Tesauro had concluded in paragraph 27 of his opinion of 4 February 1998 that there did not exist in the legal order of the Community a general principle of Community law "that sanctions (*sanzioni*; *sanctionne*; *ahndet*) the abusive exercise of a right conferred by Community law".) "Consequently, the application by national courts of domestic rules such as Article 281 of the Greek Civil Code for the purposes of assessing whether the exercise of a right arising from a provision of Community law is abusive cannot be regarded as contrary to the Community legal order", the Court held in paragraph 21. This was restated in paragraph 29: "…Community law does not preclude national courts from applying a provision of national law in order to assess whether a right arising from a provision of Community law is being exercised abusively". The "concession" to the "national courts was "more apparent than real", Advocate General Antonio Saggio said in paragraph 22 of his opinion of 28 October 1999 in Case C-373/97 Dionysios Diamantis v. Elliniko Dimosio (Greek State) and Organismos Ikonomikis Anasygkrotisis Epicheiriseon AE (OAE) [2000] ECR I-1707: "Admittedly, the Court preferred to accept that such an assessment be made by applying a national rule (*Vorschrift*) rather than a general principle of Community law; however, it was quick to make clear the limits that Community law imposes on the application of that national rule". He noted in paragraph 23 of

[335] „*Es steht zweifelsfrei fest, dass das Rechtsmissbrauchsverbot ein allgemeiner Grundsatz des Unionsrechts ist*".

[336] In the French language version, « *L'abus manifeste d'un droit n'est pas protégé par la loi* » (Feuille fédérale suisse 1907, VI, 429). "*Il manifesto abuso del proprio diritto non è protetto dalla legge*" is the Italian language version (Le autorità federali della Confederazione Svizzera, 2013).

his opinion that the Court of Justice had "expressly prohibit[ed] national courts from applying a national rule" on misuse of rights (*Rechtsmißbrauch*) "in all cases in which such application would entail a modification of the scope of the Community provision or would compromise its objectives". In paragraph 24 he said that "what is concerned is an assessment which takes into account the very scope of the rule, its intrinsic limits"[337] and he concluded in paragraph 25: "That being so, it inevitably follows that the assessment of the intrinsic limits of a Community provision conferring certain rights is an exercise in the interpretation of Community law which, in the final analysis, is a matter for the Court". The Court of Justice, in its judgement of 23 March 2000 in Case C-373/97 Dionysios Diamantis v. Elliniko Dimosio (Greek State) and Organismos Ikonomikis Anasygkrotisis Epicheiriseon AE (OAE) [2000] ECR I-1705, held in paragraph 34 that "[a]lthough national courts may, therefore, take account – on the basis of objective evidence – of abuse (*mißbräuchliche Verhalten*; *comportement abusif*) on the part of the person concerned in order, where appropriate, to deny him the benefit of the provisions of Community law on which he seeks to rely, they must nevertheless assess such conduct in the light of the objectives pursued by those provisions". In both cases the "national rule" on misuse of rights (*Rechtsmißbrauch*) was Article 281 of the Greek Civil Code, according to which "the exercise of a right is prohibited where it manifestly exceeds the bounds of good faith, morality or the economic or social purpose of that right". (Roman law, in contrast, had only prohibited "simple malevolence" (Zepos, 1962, p. 660).)

"Of right (*Recht*) in the sense of entitlement (right in the subjective sense, subjective right)"[338], Bernhard Windscheid (26.6.1817 – 26.10.1892) articulated the following "definition" (Windscheid, 1891, p. 87-88): "Right (*Recht*) is a volitional power (*Willensmacht*) or volitional dominion (*Willensherrschaft*) conferred (*verliehene*) by the legal order"[339]. "The essence of subjective rights" is "that within the bounds determined by the contents of the rights the will of the entitled ought to be (*sein soll*) authoritative", Gottlieb Planck (24.6.1824 – 20.5.1910) wrote in the third edition of his commentary to the German Civil Code (Planck, 1903, p. 373-377).

[337] "The reference made by the Court to the national system, properly understood, is to be seen…as an indication of an instrument available to the national court for the purpose of ensuring the proper application of Community law and thus preventing a right, albeit conferred by a Community provision, from being exercised where that provision is only apparently the one governing the circumstances of the particular case, or where the situation of the person in whom the right invoked is vested only apparently falls within the terms of the provision in question".

[338] "The legal order (*Die Rechtsordnung*)" is "the right in the objective sense, the objective right (*das Recht im objectiven Sinne, das objective Recht*)" (Windscheid, 1892, p. 87).

[339] There are, this definition implies, no subjective rights other than those the legal order has itself "conferred".

"The open misuse (*Missbrauch*) of a right finds no legal protection (*Der offenbare Missbrauch eines Rechtes findet keinen Rechtsschutz*)", Article 2 paragraph 2 of the Swiss Civil Code declares (Schweizerisches Bundesblatt 1907, VI, 590; Shick, 1915, p. 1). The preliminary draft (*Vorentwurf*; *Avant-projet*) of 12 November 1900 had in Article 644 "applied the notion of misuse of a right only to the right of property" (Guademet, 1904, p. 979; 1918, p. 300). "While preserving [this] in Article 670"[340] the draft (*Entwurf*; *projet*) of 28 May 1904 also "generalizes" the prohibition of the misuse of the right of property. "Practical considerations militate in favour of this formula, expressed in general terms", the Swiss Federal Council said in its message of 28 May 1904 to the Federal Assembly[341] (Feuille fédérale suisse 1904, IV, 14): "By it we have created a sort of extraordinary recourse, which should assure respect for justice to the advantage of those who may suffer from a manifest misuse of a right by a third party, whenever ordinary means are inadequate to protect them" (Guademet, 1904, p. 979; 1918, p. 300).

Article 644 of the German text of the preliminary draft of the Swiss Civil Code stated:

> „*Der Inhalt des Eigentums.*
>
> *Wer Eigentümer einer Sache ist, kann in den Schranken der Rechtsordnung über sie nach seinem Belieben verfügen.*
>
> *Er kann von ihr jeglichen Gebrauch machen, der nicht offenbar einzig zu dem Zwecke erfolgt, Andern Schaden zuzufügen.*
>
> *Er kann sie von Jedem herausverlangen, der sie ihm vorenthält, und hat das Recht, jede ungerechtfertigte Einwirkung abzuwehren*".

> "The content of the right of ownership.
>
> He who is the owner of a thing may within the limits of the legal order dispose of it as he pleases.
>
> He may make any use of it which is not obviously made solely for the purpose of causing harm to others.
>
> He may demand the return (*herausverlangen*) of it, from anyone who deforces him of it, and has the right to ward off (*abwehren*) any unjustified action (*Einwirkung*)".

[340] Article 670 of the draft (*Entwurf*; *Projet*) of 28 May 1904. Article 679 of the Civil Code.

[341] *Message du Conseil fédéral à l'Assemblée fédérale concernant le projet de code civil suisse. (Du 28 mai 1904.)* (Feuille fédérale suisse 1904, IV, 14).

The French text of Article 644 of the preliminary draft of 12 November 1900 read (Département fédéral de justice et police, 1900, p. 159):

> « *Eléments du droit de propriété.*
>
> *Le propriétaire l'une chose a le droit d'en disposer librement dans les limites de la loi.*
>
> *Il peut en user de la manière la plus absolue, pourvu qu'il ne le fasse pas dans le but évident de nuire à autrui.*
>
> *Il pourra la revendiquer contre quiconque la détient sans droit, et repousser toute usurpation* ».

> "Elements of the right of ownership
>
> The owner of a thing has the right to freely dispose of it within the limits of the statute.
>
> He may use it in the most absolute manner, provided that he does not do so with the evident purpose of harming others.
>
> He may claim against anyone who holds without right, and repel any usurpation".

The misuse (*abus*) or, in the German text, exceeding (*überschreitet*) of the right of ownership – *l'abus qu'un propriétaire fait de son droit* – is the subject of Article 670 of the draft (*Entwurf*; *projet*) of 28 May 1904. It provides, according to the German text, that anyone who is "as a result…damaged (*geschädigt*) or threatened with harm (*Schaden*)…can sue for obviation of the violation (*Verletzung*) or for precaution (*Vorkehrung*) to protect against imminent harm and for compensation (*Schadenersatz*)"[342].

This became, in a modified form, Article 679 of the Swiss Civil Code of 10 December 1907.

Article 679 of the Swiss Civil Code provides that if the right of ownership is exceeded anyone "harmed (*geschädigt*) or threatened with harm (*Schaden*)…can sue for obviation of the harm (*Schädigung*) or for protection against imminent harm and for compensation

342 In the French text, « *Quiconque est atteint ou menacé de dommage par l'abus qu'un propriétaire fait de son droit, a contre lui une action pour le contraindre à remettre les choses en l'état, ou à prendre des mesures propres à écarter le danger, sans préjudice de tous dommages-intérêts* » (Feuille fédérale suisse 1904, IV, 276).

(*Schadenersatz*)"[343] (Schweizerisches Bundesblatt 1907, VI, 773). Both the German text of Article 679 of the Swiss Civil Code and the German text of the corresponding article in the draft of 28 May 1904 refer to the right of ownership of a landowner (*Grundeigentümer*). The French text, however, refers to the right of an owner *(un propriétaire*) and the Italian text to the right of ownership (*diritto di proprietà*) of an owner (*un proprietario*).

Article 3 paragraph 2 of the draft of 28 May 1904 "generalizes" the prohibition of the misuse of the right of property in Article 644 of the preliminary draft and Article 670 of the draft. Accoding to the German text of Article 3 paragraph 2 of the draft of 28 May 1904: "The open misuse of an entitlement experiences no legal protection (*Der offenbare Mißbrauch einer Berechtigung erfährt keinen Rechtsschutz*)" (Schweizerisches Bundesblatt, 1904, IV, 100). In the French text it is the "obvious misuse (*abuse évidemment*)" of one's right that "does not enjoy any legal protection"[344] (Feuille fédérale suisse 1904, IV, 99). The Geman text of Article 2 paragaph 2 of the Swiss Civil Code provides: "The open misuse (*Missbrauch*) of a right finds no legal protection" (Schweizerisches Bundesblatt, 1907, VI, 590). The French and Italian texts state that the "manifest misuse (*abus manifeste*; *manifesto abuso*)" of a right is not legally protected.

"What are those cases in which the exercise of right would become an act contrary to right (*contraire au droit*)? The partisans of the doctrine do not all agree", Alfred Martin (16.3.1847 – 30.5.1927), professor of civil law at the University of Geneva, observed (Martin, 1906, p. 28):

> "Some say that the use of right becomes misuse when it has the exclusive purpose (*but*) of causing prejudice to others. Others go one step further. They condemn the exercise of right when it takes place without interest, or else they propose to assign to individual rights their just and true measure, 'by scrutinizing their economic and social purpose (*but*) and by comparing its importance to that of the interests which it contradicts' [Gény (1899, p. 544)].
>
> Others, finally, confine themselves to posing the rule that the one who misuses (*abuse*) his right does not merit legal protection, without defining in any way misuse (*abus*) of rights".

[343] In the French text, « *Celui qui est atteint ou menacé d'un dommage parce qu'un propriétaire excède son droit, peut actionner ce propriétaire pour qu'il remette les choses en l'état ou prenne des mesures en vue d'écarter le danger, sans préjudice de tous dommages-intérêts* » (Feuille fédérale suisse 1907, VI, 607).

[344] « *Celui qui abuse évidemment de son droit ne jouit d'aucune protection légale* ».

There is no "specific provision" in the French Civil Code of 21 March 1804 on misuse of rights (*abus de droit*)[345]; the Code "reflect[s] the doctrine of absolute rights expressed by the maxim: *Neminem laedit qui suo jure utitur*" (David & de Vries, 1958, p. 132). The principle *neminem laedit qui suo jure utitur*[346] "may be directly traced" to the Justinian *Digesta* (Borchard, 1913, p. 696): *Nemo damnum facit, nisi qui id fecit, quod facere jus non habet*[347] (Krüger, Mommsen, Schöll & Kroll, 1889, p. 872). The "notion of misuse of rights…implies the abandonment of the maxim *Neminem laedit qui suo jure utitur*, and thereby supposes a profound modification of the idea of rights itself", Eugène Gaudemet (13.10.1872 – 1933) of the University of Dijon wrote in an essay published in a collection commemorating the centenary of the French Civil Code in 1904 (Guademet, 1904, p. 971). Martin (1906, p. 27) agreed that "the idea which is at the base of the theory of misuse of rights...is the negation of the principle that the exercise of a right is always licit, even when it causes a prejudice to others. (*Qui suo jure utitur neminem laedit*.)". There not being a "specific provision" on misuse of rights in the French Civil Code did not, however, prevent the courts in France from "apply[ing]" the concept[348] of misuse of rights. The "main body of French case-law" on misuse of rights is "based on" Article 1382 of the Civil Code (Cueto-Rua, 1975, p. 966): "Any act whatsoever of man, which causes damage to another, obliges the one by whose fault it is arrived to repair it"[349].

In the absence of a statutory definition of the term misuse (*abus*) "the judges will be free to interpret it as they please", Martin wrote in an essay published in 1909 (p. 35). Of the doctrinal definitions of the concept of misuse of rights in France the definition of Raymond Saleilles (14.1.1855 – 3.3.1912) is often quoted (Saleilles, 1905, p. 334):

[345] As the Supreme Court of Canada noted in Houle v. Canadian National Bank [1990] 3 SCR 122.

[346] No one hurts (*laedit*) who uses their own rights. Also written *qui jure seo utitur, neminem laedit* – who uses their own rights, hurts no one (see plenary decision of 5 June 1895, Z. 5037, *k.k. Obersten Gerichts- und Cassationshofe* (*Beilage zum Verordnungsblatt des k.k. Justizministeriums* 1895, Nr. 1180, p. 162)).

[347] No one does damage except those who did what they had no right to do.

[348] See the judgement of the Supreme Court of Canada in Houle v. Canadian National Bank [1990] 3 SCR 122.

[349] « *Tout fait quelconque de l'homme, qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer* ».

> "…given an act licit in itself, by its external and material conditions, there is misuse of rights (*abus de droit*) if it is permissible (*permis*) to consider this act as illicit and contrary to law, solely by reason of its intended goal (*but intentionnel*)"[350].

It is, according to that definition, "properly in the intention of the person exercising their right that we must seek the character of misuse of rights (*abus de droit*)…", Martin (1909, p. 32) explained. Martin (1909, p. 33) then asked: "But whom will discern the intentions of the one exercising their rights? The judge. It is he who will be sovereign appraiser of secret thoughts, and of hidden intentions"[351]. "The one who invokes his rights will have to be purely and simply nonsuited (*débouté*), if the tribunal esteems that he acts with a bad intention…" (Martin, 1909, p. 34). He or she will be "deprived of the protection of the law". "Behold therefore the denial of justice authorized, at the will of the judge!"[352] (Martin, 1909, p. 34). Adhémar Esmein (1.2.1848 – 20.7.1913), in a note in Recueil Sirey, 1898, I, 17, 21 argued that "the exercise of a right, within the limits that the statute has traced for it, cannot be illicit, whatever the intention of the one who exercises it". "In thus entering into the researching of intentions, in professing that a right maliciously exercised, though without any fraudulent maneuver, may give rise to damages, one substitutes, we fear, *moral fault* for *juridical fault*, and one transforms our judges into censors"[353]. It is, he said, an "inane…thesis". Saleilles (1905, p. 348), in the same report in which he defined misuse of rights, commented: "An act the *effect* of which can only be to harm others, without appreciable and legitimate interest for the one who accomplishes it, can never constitute a licit exercise of a right" (emphasis added). This statement is inconsistent with his definition of misuse of rights in the same report because it makes the "effect" of the act the criterion to be used. Marcel Planiol (23.9.1853 – 31.8.1931) argued that "*the right ends where the misuse begins* (le droit cesse où l'abus commence)" that a right "cannot" be misused

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[350] « *Celui-ci pourrait donc se définir de la façon suivante: étant donné un acte licite en lui-même par ses conditions extérieures et matérielles, il y a abus de droit s'il est permis de considérer cet acte comme illicite et contraire au droit, uniquement à raison de son but intentionnel* ».

[351] « *Mais qui discernera les intentions de celui qui exerce son droit? Le juge. C'est lui qui sera souverain appréciateur des pensées secrètes, et des intentions cachées* ».

[352] « *Celui qui invoque son droit devra donc être purement et simplement débouté, si le tribunal estime qu'il agit dans une mauvaise intention, dans un esprit de lucre, par exemple. C'est une chose grave que d'être privé de la protection de la loi. Voilà donc le déni de justice autorisé, au gré du juge!* »

[353] An allusion to the censors in the Roman republic. "One who exercises official or officious supervision over morals and conduct" is the transferred sense of "censor" in the English language (Murray, 1893, p. 218).

"because the same act cannot be *simultaneously conformable and contrary to law* (tout à la fois conforme et contraire au droit)" (Planiol, 1902, p. 265): "…most rights are not absolute; they have on the contrary *limits*, beyond which the holder loses the ability (*faculté*) to act and must be considered to be *without right*". A person who exceeds the limits of a right is "without right" and therefore is not misusing a right. Who will determine, if the legislature has not, those limits? Gény (1919b, p. 171) felt that "the great difficulty" of the "theory" of misuse of rights "consists in distinctly characterizing the misuse of the right, which, exceeding its legitimate exercise, alone gives rise to liability…". He said he was personally "inclined to believe that we will only discover the measure, just and true, of individual rights by scrutinizing their economic and social purpose (*but*) and by comparing its importance to that of the interests which it contradicts" (Gény, 1919b, p. 171-172).

The *Tribunal civil* of Toulouse, in a significant judgement of 13 April 1905 reported in the Recueil Dalloz, 1906, II, 105, held:

> "That the notion of misuse of right (*abus du droit*) is related to the idea of purpose (*but*); that not only every right is limited in its content, but that moreover its exercise may not take place for any purpose (*but*) whatsoever; that there is misuse (*abus*) if the right is exercised with a view to harming others, perhaps also if the right is exercised without interest or without legitimate motives…".

Louis Josserand (31.1.1868 – 8.11.1941) commented on "the definition that it gives of misuse (*abus*)" in a note in the Recueil Dalloz, 1906, II, 105, 106:

> "There is misuse 'if the right is exercised with a view to harming others'. It is not to harm our fellow man that our rights are recognized by the collectivity, and malevolence cannot in any case constitute a licit motivation (*mobile*). And the tribunal add that there is misuse (*abus*) 'perhaps also if the right is exercised without interest or without legitimate motives (*motifs*)'. The formula is dubitative, and it is to be regretted; for, in this theory of misuse (*abus*), it is not possible to stop halfway; if malevolence is considered as constituting misuse (*abus*), it is evidently because it does not represent the motivation (*mobile*) in view of which the right has been conferred by the legislature; and so one is invincibly led to treat the same any motivation (*mobile*) other than this one; we do not see the reason for sub-distinctions; there is, for each right, a *legitimate*

> *motive* outside of which its exercise becomes generative of liability, such that, practically, the whole theory of misuse of rights (*l'abus des droits*) is reduced to the notice of legitimate motive (*motif légitime*)".

It is, Josserand, wrote in Recueil Dalloz, 1906, II, 105, "a question of *legitimate motive*, of *legitimate interest*, of *legitimate cause*; it is the absence of such an element that...denounces misuse in the exercise of a right...":

> "Thus, our rights are not endowed with a purely intrinsic value; they are instruments intended to ensure the reign of justice; they are not justice itself; social products, they may not by a strange disavowal of their origins and of their ends, realize what is anti-social, contrary to collective morality, that is to say contrary to right; each one of them has a purpose (*but*) which it may not move away from at any moment of its practical realization and which comes therefore to limit its field of legitimate exercise; in rights, as in morality, the means are not justified by the end".

The "principle" stated by the Court in Alexandros Kefalas and others v. Elliniko Dimosio (Greek State) and Organismos Oikonomikis Anasygkrotisis Epicheiriseon AE (OAE) [1998] ECR I-2843 that Community law "cannot be relied on for abusive…ends…" is "not, by itself, a useful instrument for assessing whether a right arising from a specific provision of Community law is being exploited abusively", Advocate General Miguel Poiares Maduro acknowledged in paragraph 64 of his opinion of 7 April 2005 in Case C-255/02 Halifax plc, Leeds Permanent Development Services Ltd and County Wide Property Investments Ltd v. Commissioners of Customs & Excise [2006] ECR I-1613: "A more detailed doctrine or test to determine when an abuse [*ein Missbrauch* in the German language version] occurs is necessary to render it operative".

"It has been observed", Advocate General Eleanor Sharpston said in paragraph 59 of her opinion of 8 July 2010 in Case C-303/08 Bozkurt v. Land Baden-Württemberg [2010] ECR I-13445, "that the test for establishing whether there has been conduct amounting to abuse (*Verhalten vorliegt, das einen Rechtsmissbrauch darstellt*) in an individual case is 'whether there has been a distortion of the purposes and objectives of the Community provision which grants the right in question' ". (She was quoting from paragraph 115 of the opinion of Advocate General Antonio Tizzano in Case C-200/02 Kunqian Catherine Zhu and Man Lavette Chen v.

Secretary of State for the Home Department [2004] ECR I-9925.) In paragraph 67 of her opinion Advocate General Sharpston stated that "in order to determine whether there has been an abuse of rights [*ein Rechtsmissbrauch* in the German language version]…it is necessary to look to the requirements laid down in the case-law". She cited the judgement of 14 December 2000 of the Court of Justice in Case C‑110/99 Emsland-Stärke GmbH v. Hauptzollamt Hamburg-Jonas [2000] ECR I-11569, in which, she said, "the Court held that a two-stage test must be applied":

> "In the first place, it is necessary to establish a combination of objective circumstances in which, despite formal observance of the conditions laid down by the Community rules, the purpose of those rules has not been achieved. In the second place, there must be a subjective element consisting in the intention to obtain an advantage from the Community rules by creating artificially the conditions laid down for obtaining it. That subjective element must represent the 'sole purpose' of the conduct in question".

The national court[354], she related, had "observe[d]" that Mr Bozkurt's conduct makes him 'unworthy' of receiving rights under Article 7" of Decision 1/80 of the EEC-Turkey Association Council. " 'Unworthiness' is not the test laid down in Emsland-Stärke", the Advocate General remarked in paragraph 68 of her opinion.

"Ultimately the law (*das Recht*) is after all intended to serve human needs", a German jurist, Heinrich Dernburg (3.3.1829 – 23.11.1907), wrote in 1896 (Dernburg, 1896, p. 93): "Therefore it is impermissible to misuse one's right *merely to harm others*. Such *dolus*[355] also makes one liable to pay compensation (*schadensersatzpflichtig*)". "The exercise of a rights is", Windscheid (1862, p. 291) had written, "not unlawful because through it (*dadurch*) another has been harmed; only is this unallowed, to exercise a right *merely* to the end through it to harm

[354] In this case, the German *Bundesverwaltungsgericht* – Federal Administrative Court.

[355] An *actio doli* is an action for deceit (*dolus*) in Roman law (and in civil law countries). To quote the judgement of the Supreme Court of Natal in Sander & Co. v. Douglas (1900) 21 NLR 246, 258, '…the *dolus*, here relied on, is…defined as 'craft, deceit and trickery, resorted to for the purpose of entrapping, circumventing and cheating another' (Dig. 4.3.1.2.)". This was the Court's English translation of the definition of *dolus malus* in the Justinian *Digesta* (*omnem calliditatem fallaciam machinationem ad circumveniendum fallendum decipiendum alteram adhibitam*) (Krüger, Mommsen, Schöll & Kroll, 1889, p. 53). Roman law distinguished between *dolus malus* ("deceit with an evil intention") (Bouvier, 1871, p. 497) and *dolus bonus* "(justifiable deceit), which was allowed in certain cases, such as in self-defense against an unlawful attack" (Burrill, 1850, p. 391). See book IV title III of the *Digesta* (*De dolo malo*) (Krüger, Mommsen, Schöll & Kroll, 1889, p. 53-56).

another"[356] (emphasis added). A provision to this effect was included in the German Civil Code. Article 226 provides (Bundesministerium der Justiz, 2010, p. 32): "The exercise of a right is impermissible if it can only have the purpose of inflicting harm on another (*Die Ausübung eines Rechts ist unzulässig, wenn sie nur den Zweck haben kann, einem anderen Schaden zuzufügen*)".

Article 7 paragraph 2 of the Spanish Civil Code is analogous to Article 2 paragraph 2 of the Swiss Civil Code. Article 7 paragraph 2 sentence 1 of the Spanish Civil Code denies legal protection to "the misuse of rights or the antisocial exercise of the same (*el abuso del derecho o el ejercicio antisocial del mismo*)" (Ministerio de Justicia, 2012, p. 3) and the next sentence provides that any act or omission "which, as a result of the author's intention, its purpose or the circumstances in which it is performed manifestly exceeds the normal limits to exercise a right, with damage to a third party, shall give rise to the corresponding compensation and the adoption of judicial or administrative measures preventing persistence in such abuse".

Acts performed "in the *regular* exercise of a recognized right (*no exercício regular de um direito reconhecido*)" do not constitute "illict acts (*atos ilícitos*)", Article 188 of the Brazilian Civil Code of 10 January 2002[357], which is a reiteration of Article 1 of the Civil Code of 1 January 1916[358], provides (emphasis added). Prior to its amendment in 1968 Article 1071 of the Argentinean Civil Code provided: "The exercise of one's own right or the fulfillment of a legal obligation cannot constitute an illicit act"[359]. The amendment of 22 April 1968[360], "in addition to incorporating the wholly new second paragraph…added the qualifying element of 'regular' to the first paragraph thereof" (Skola & Perey, 1981, p. 44). Article 1071 of the Argentinian Civil Code now reads:

[356] "It is thus presupposed that the entitled not have any other interest in the exercise of his right. It is naturally not on him, to demonstrate such an interest; the opponent must prove the absence of the same, and to bring this proof is very difficult" (Windscheid, 1862, p. 291).

[357] Lei nº 10.406 of 10 January 2002:
http://www.planalto.govbr/ccivil_03/leis/2002/L10406.htm

[358] Lei nº 3.071 of 1 January 1916.

[359] "*El ejercicio de un derecho propio o el cumplimiento de una obligación legal no puede constituir como ilícito ningún acto*".

[360] See Article 1 paragraph 54 of ley 17.711 of 22 April 1968.

> "The *regular* exercise of one's own right or the fulfillment of a legal obligation cannot constitute an illicit act.
>
> The law does not protect the misuse of rights (*el ejercicio abusivo de los derechos*). It considers as such those that contradict the ends which the former had in view in recognizing them or that exceed the limits imposed by good faith, morals and good customs"[361]. (Emphasis added.)

This amendment "abolished" in Argentina the principle of "the absolute character of rights" (Lisbonne, 1968, p. 353).

The Argentinian jurist Guillermo Borda (22.9.1914 – 23.7.2002) was "one of the principal drafters of the 1968 amendment…" (Skola & Perey, 1981, p. 45). Borda was the then Minister of the Interior. The first paragraph of Article 1071, he later wrote, "reproduces the original Article 1071, with an important addition, which is the word regular" (Borda, 1996, p.33). "This substantially modifies the sense of the norm: the exercise of a right is not always protected by the law: it must be a regular exercise, that is to say, fair, legitimate, normal". Borda (1996, p. 32) saw the original Article 1071 as a "serious obstacle" to the "reception of the theory of misuse of rights" but he noted: "*Notwithstanding* the categorical terms in which this norm was conceived and which implied a repudiation of the theory of misuse of rights, it made its way into case-law, albeit with extreme slowness and timidity" (emphasis added). He said he did not "believe justified the fears of those who think that this power in the hands of the judges may turn into an instrument of legal insecurity and a way of denying people rights which the statutes recognize" (Borda, 1996, p. 29). He reviewed the different possible "criteria" for assessing whether a right has been misused (Borda, 1996, p. 30-31):

> a) "In accordance with the first criterion, there would be misuse of the right when it has been exercised without any interest and with the sole purpose of harming others (*perjudicar a terceros*). This was the point of departure from which the theory made its way, timidly, into French case-law.
>
> …

[361] "*El ejercicio regular de un derecho propio o el cumplimiento de una obligación legal no puede constituir como ilícito ningún acto.*

La ley no ampara el ejercicio abusivo de los derechos. Se considerará tal al que contraríe los fines que aquélla tuvo en mira al reconocerlos o al que exceda los límites impuestos por la buena fe, la moral y las buenas costumbres" (Ministerio de Economía y Finanzas Públicas, 2005).

Very soon it became clear that this criterion had proved insufficient. The acts realized without any interest are very exceptional; even in the most repudiable there is generally an interest that is guiding the author...".

b) "In accordance with a more comprehensive criterion…there would be misuse of the right when it has been exercised contrary to the economic and social ends that inspired the statute by which it was granted".

c) "Finally, there would be abuse of the right when it is exercised contrary to morality and good faith".

Borda (1996, p. 31) believed that "the moral point of view is the most decisive and fruitful in the elucidation of this problem":

> "For if the theory of abuse of rights has gained ground it is for reasons of moral order. All the arguments of prestigious legal experts against its admission have crashed against the sense of justice which lies in the human heart and which could not admit the justification of the arbitrary, immoral, harmful, in the name of right (*derecho*)".

"In his determination the judge must", Borda (1996, p. 33) wrote, "take into account whether there is: 1) intention to harm; 2) absence of interest; 3) whether there was chosen, among various ways of exercising the right, one that is harmful (*dañosa*) to others; 4) whether the prejudice (*perjuicio*) occasioned is abnormal or excessive; 5) if the conduct or manner of acting is contrary to good customs (*buenas costumbres*); 6) whether the person has acted in an unreasonable manner, repugnant to loyalty and to reciprocal confidence". As the misuse of rights "is not permitted, such conduct is illicit" and "produces, therefore, all of the effects proper to an illicit act", he said (Borda, 1969, p. 726):

> "Firstly, the judge will deny protection to whomever seeks to abusively exercise a right and will reject his claim (*demanda*)[362]. Secondly, if the abusive conduct makes its effects felt extra-judicially, the judge must call on the culprit to stop it. Lastly, the culprit shall be liable for the damages and injuries (*daños y perjuicios*) in the same manner as the author of any illicit deed".

[362] Application, action (and literally, demand) are other possible translations of *demanda*.

The concept of misuse of rights was "incorporated into the Japanese Civil Code by the amendment in 1947 to Article 1" (Hayashi, 2008, p. 20; Sono & Fujioka, 1975, p. 1043). Article 1 of the Japanese Civil Code comprises three paragraphs (Ministry of Justice, 2013):

> "Private rights must conform to the public welfare.
> The exercise of rights and performance of duties must be done in good faith.
> No misuse[363] of rights is permitted".

The Supreme Court of Japan, in a judgement of 27 June 1972[364] on the misuse of rights, held (Sono & Fujioka, 1975, p. 1037):

> "In all cases a right must be exercised in such a fashion that the result of the exercise remains within a scope judged reasonable in the light of the prevailing social conscience. When a conduct by one who purports to have a right to do so fails to show social reasonableness and when the consequential damages to others exceed the limit which is generally supposed to be borne in the social life, we must say that the exercise of the right is no longer within its permissible scope".

Martin (1906, p. 55) strongly criticized Article 3 paragraph 2 of the draft (*projet*) of the Swiss Civil Code because it "does not give any indication…any clarification, any definition" in regard to when one would be "considered as misusing one's right"[365]:

> "It will not suffice to have an incontestable and uncontested right, it will take in addition making a use of the right which appears licit to the competent judge. And according to which principles should (*devra*) the judge establish a distinction between licit use of rights and misuse? Exclusively according to the principles that he will borrow from his own wisdom. In other words, it is arbitrariness which is installed in the place of rights (*droit*)...".

[363] The Japanese characters 濫用 can be translated as either misuse or abuse.

[364] 26 Saiko saibansho minji hanreishu 1067, 1069.

[365] Nor does Article 2 paragraph 2 of the Swiss Civil Code.

"The best is the statute which leaves the least discretion to the judge (*optima est lex quae minimum relinquit arbitrio judicis*)", Francis Bacon (22.1.1561 – 9.4.1626), asserted in *De dignitate et augmentis scientiarum*[366] (1623) (Spedding, Ellis & Heath, 1858, p. 805). In 1799 the Scottish jurist James Mackintosh (24.10.1765 – 30.5.1832) warned against "the dangerous power of discretion" and hoped that over time the "domain" of "arbitrary will" would be "gradually contract[ed], within the narrowest possible limits" (Mackintosh, 1799, p. 58). When one can say for one's decision "nothing but *tel est mon plaisir*[367], the situation is unfortunate, to say the least", Stammler (1923b, p. 878) remarked. Kantorowicz (1911c, c. 354) wrote that "gaps in the formal law (*Lücken im förmlichen Rechte*)...must be filled, not according to one's pleasure (*nach Willkür*[368]), but by norms, therefore by norms of free law; the judge must find these in 'free' creative activity, i.e. following his scientific conviction, but always with due regard to (*unter Berücksichtigung*) the needs of the present, the dominant views among the people, the interest positions of the individual case and its typical sociological structure, subject to the integration of the new norm into the system of ends pursued by the positive law (*unter Eingliederung der neuen Norm in das System der vom positiven Recht verfolgten Zwecke*)". There is "an ineradicable degree of independence and of subjectivity in all juridical activity" but legislation can make that degree of independence and of subjectivity "at least as small as possible" (Kantorowicz, 1911c, c. 355).

[366] The dignity and advancement of learning.

[367] "Such is my pleasure" (Worcester, 1860, p. 601). "For such is our pleasure (*Car tel est notre plaisir*)" was a "[f]ormula appended to edicts, proclamations, orders, etc. , of French monarchs and first used in the reign (1461 – 1483) of Louis XI. Suppressed in the reign (1830 – 1848) of Louis-Philippe. The phrase underwent various modifications in successive reigns. Another form, often quoted, is *Car tel est notre bon plaisir*, and there are instances of its use in the reign of Louis XVI in 1787 – 1788" (Latham, 1906, p. 88-89).

[368] In Latin, *ad libitum* (Schmidt & Tanger, 1907, p. 955). The literal translation of *ad libitum* is "according to pleasure": http://www.oxforddictionaries.com/definition/english/ad-libitum

Chapter 7

Although both are representatives of the free law movement the work of Kantorowicz and in particular Ehrlich on the sociology of law is not considered with their work as representatives of the free law movement. Kantorowicz (1934b, p. 1241), in an article published in 1934, modestly wrote that he had "had a certain share in both movements" and he identified Ehrlich as the only other representative of both movements. Kantorowicz (1934b, p. 1241) believed that "the law must be interpreted according to its aims, that these aims are to be found in its (desirable) effects on social (including economic) life, and that therefore the law cannot be understood nor applied without the aid of a sociological (including economic) study of social reality"[369]. The law "is a societal phenomenon *(das Recht eine gesellschaftliche Erscheinung ist*)", Ehrlich (1913, p. 19) wrote in *Grundlegung der Soziologie des Rechts*[370]. The sociology of law does not have to concern itself with "the interpretation of legal prescriptions, but with their societal observation (*die Soziologie des Rechts, die sich nicht mit der Auslegung der Rechtsvorschriften, sondern mit deren gesellschaftlicher Betrachtung zu befassen hat*)...", he wrote (Ehrlich, 1913, p. 158).

This chapter examines the concept of extra-state law defined by Eugen Ehrlich in *Grundlegung der Soziologie des Rechts* (1913) and his other writings and compares it to the definition of law of Josef Kohler in an article published in the *Zeitschrift für vergleichende Rechtswissenschaft*[371] in 1887, the theory of "the normative force of the factual" of Georg Jellinek, the concept of cultural norms of Max Ernst Mayer, Stanislaus Dniestrzański's article on *Das Gewohnheitsrecht und die sozialen Verbände*[372] (1905/1902), the definition of law and theory of recognition of Ernst Rudolf Bierling and Valtazar Bogišić's research on legal customs.

"State law (*staatliches Recht*) is above all the state constitution itself, all law connected with the army, financial law, the law of the security-, health- and traffic police, likewise the law of modern social policy and of social insurance" (Ehrlich, 1922a, p. 9). "State law (*staatliches*

[369] See also Kantorowicz (1937, p. 325), quoted in the section on Kantorowicz in chapter 5 of this thesis.

[370] Foundations of the sociology of law.

[371] Journal of comparative legal science.

[372] Customary law and social associations.

Recht) consists for the most part of administrative norms (*Verwaltungsnormen*) (instructions, which are addressed to administrative officials). But thereunder are also decision norms (*Entscheidungsnormen*) (instructions to the judge, how he should proceed and decide in legal disputes)", Ehrlich (1922a, p. 10) wrote in *Die Soziologie des Rechts*[373], an article published in a Japanese legal journal in 1922[374]. "State law", he had written in 1913 in *Grundlegung der Soziologie des Rechts*, "is a law that is created only by the state and could not exist without the state" (Ehrlich, 1913, p. 110). State law is not the only law in a state.

Josef Kohler (1887c, p. 323-324), in an article published in 1887 in the *Zeitschrift für vergleichende Rechtswissenschaft* on the law of Aboriginal Australians, wrote:

> "…the law (*das Recht*) exists before any state organization, before any court, before any executory arrangement (*Veranstaltung*): it exists in the hearts of the people as the sense of what ought to be and what ought not to be (*Gefühl des Seinsollenden und Nichtseinsollenden*); it exists and expresses itself in the reaction of the generality, in the reaction which is borne by this sense of what ought to be and what ought not to be. It may still be left to individuals to procure themselves justice, it may be lacking in all possibility to bring the question of right and of non-right (*die Frage des Rechts und des Unrechts*) to formal decision – the law (*das Recht*) expresses itself in this, that the collectivity not only approves or disapproves of the act of the individual, but that it supports those whom it believes in the right in the exercise of legal prosecution (*Rechtsverfolgung*).
>
> …
>
> ... immediately the sense of what is right (*das Rechtsgefühl*) expresses itself in the act – and that not merely in the act of the individual, but in an act which is borne by the support of the generality – immediately the law (*das Recht*) has attained existence, immediately the law is born. Hence there is no people (*Volk*) without law; there are peoples (*Völker*) without courts; there are peoples with which state organization is lacking or is developed only in its utmost rudiments – but a people without law there is not…".

[373] The sociology of law.

[374] „*Staatliches Recht besteht zum größten Teil aus Verwaltungsnormen (Weisungen, die an die Verwaltungsbeamten gerichtet sind). Doch sind darunter auch Entscheidungsnormen (Weisungen an den Richter, wie er in Rechtsstreitigkeiten vorgehen und entscheiden solle)*".

The "manifestations of the ruling (*waltenden*) sense of what is right in the breast of the people" are law (Kohler, 1887c, p. 323).

"Were the general recognition of, and actual compliance with, certain norms of human conduct sufficient to lend them the stamp of the law...morals (*Moral*) and conventions (*Sitte*) would have claim to this name, because of the general recognition and observance they are also not lacking, and the whole difference between law, morals, conventions would be eliminated", von Jhering argued in his book *Der Zweck im Recht*[375] (1893, p. 322).

"What is considered law in every nation is initially that which is in fact practiced as law", Georg Jellinek (16.6.1851 – 12.1.1911) wrote in *Allgemeine Staatslehre*[376] (1900). "The continual practice produces the idea of the normness (*Normmässigen*) of this practice and the norm itself appears therewith as an authoritative precept of the community, thus as a legal norm[377] (Jellinek, 1900, p. 308). He described this as "the normative force of the factual (*der normativen Kraft des Faktischen*)..." (Jellinek, 1900, p. 308). "Cognizance (*Erkenntnis*) of the normative force of the factual (*der normativen Kraft des Faktischen*) is of the highest importance for insight into the evolution of law and morality"[378], he wrote (Jellinek, 1900, p. 308). "The origin of the conviction of the existence (*Dasein*) of normal conditions lies in a certain psychologically-conditioned attitude (*Verhalten*) of people to factual occurrences" (Jellinek, 1900, p. 307): "Man sees the always surrounding him, the continually perceived by him, the uninterruptedly practiced by him, not only as a fact, but also as an evaluation norm (*Beurteilungsnorm*), by which he proves deviation, with which he judges what is alien". "To seek the basis of the normative force of the factual in its conscious or unconscious reasonableness would be entirely wrong (*Verkehrt*). The actual can later be rationalized, its normative significance lies however in the wider indeducible property (*Eigenschaft*) of our nature, in virtue of which the already practiced is physiologically and psychologically more easily reproducible than the new" (Jellinek, 1900, p. 308). "Customary law (*Gewohnheitsrecht*)", Jellinek (1900, p. 309) said, "originates from the general psychological property (*Eigenschaft*) which considers the continually recurring factual as the normative…".

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[375] Purpose in law.

[376] General theory of the state.

[377] „*Als Recht gilt in einem jeden Volke zunächst das, was faktisch als Recht geübt wird. Die fortdauernde Uebung erzeugt die Vorstellung des Normmässigen dieser Uebung und es erscheint damit die Norm selbst als autoritäres Gebot des Gemeinwesens, also als Rechtsnorm*".

[378] „*Für die Einsicht in die Entwicklung von Recht und Sittlichkeit ist die Erkenntnis der normativen Kraft des Faktischen von der höchsten Bedeutung*".

"In reality, state-made law is only one of the many forms of law obtaining in a state…", Kantorowicz (1958, p. 86) wrote in his last published work. Ehrlich (1917c, p. 205) believed that "in the main the law (*daß Recht*) is produced by societal forces, not by the state": "...the greater part of legal life goes on in general far from the state, the state authorities and state law" (Ehrlich, 1913, p. 129; 1936, p. 162). The legal proposition (*Rechtssatz*) is "only one and moreover a late and derivative form of law…" (Ehrlich, 1922a, p. 20). "The state", he said, "would be the source of all law if the building-blocks (*Bausteine*) of the legal order, the most important corporate bodies, marriage, family, possession, contract, testamentary arrangements, were created (*geschaffen*) by state law and had evolved from the basis (*Grund*) of state law, if jurists' law, which is joined to it, were suggested (*eingegeben*) by the state" (Ehrlich, 1917c, p. 273-274):

> "Legal history shows, however, that the fundamental legal institutions of society are for the most part older than the state, that they have just as often originated and are further developed, even if in the state, then at least without the state, and that the mass of jurists' law is incorporated (*aufgenommen*) independently of state law: the stateness (*Staatlichkeit*) of all this law is consequently only a fiction of stateness (*die Staatlichkeit alles dieses Rechts ist daher nur eine Fiktion einer Staatlichkeit*)".

Ehrlich (1907, p. 8) disputed that "the legal compulsion (*Rechtszwang*) emanating from the courts and other authorities[379], constitutes (*bilden*) an essential characteristic of the law (*ein wesentliches Merkmal des Rechts*)". In contrast, von Jhering (1893, p. 322; 1913, p. 241) had said that "a legal proposition (*Rechtssatz*) without legal compulsion (*Rechtszwang*) is a contradiction in itself, a fire that does not burn, a light that does not shine"[380]. Ehrlich (1913, p. 54) asked: "Would the law (*das Recht*) without compulsion (*Zwang*)…really only be a fire that does not burn, as Jhering said?" "Incidentally, there are many types of fire that do not burn", he added in parentheses. For the jurist "who does not want to lose all solid ground under his feet…there is no other criterion of the law (*des Rechts*) than recognition and realization of the same through the authority of the state", von Jhering (1893, p. 321) insisted. Ehrlich (1913, p. 15) did not agree.

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[379] "...psychological compulsion through threatened punishment (*Strafe*) and threatened compulsory execution (*Zwangsvollstreckung*) (Ehrlich, 1913, p. 15).

[380] „*...ein Rechtssatz ohne Rechtszwang ist ein Widerspruch in sich selbst, ein Feuer, das nicht brennt, ein Licht, das nicht leuchtet*".

Max Ernst Mayer (2.7.1875 – 25.6.1923) was, according to Kantorowicz (1934b, p. 1241), one of the men who "developed" the free law doctrine and Mayer's *Rechtsnormen und Kulturnormen*[381] (1903) is one of the books listed in the appendix to Kantorowicz's *Der Kampf um die Rechtswissenschaft* (1906, p. 50). "Norms are rules, namely rules of a practical nature, i.e. instructions for human actions"[382], Mayer (1903, p. 16) wrote. "They appear with the claim to be authoritative; they want to be followed, they are therefore imperatives, either positive (commands) or negative (prohibitions)". "The norms which provide for the use of physical means of compulsion are legal norms", Mayer (1903, p. 20) argued. He said that "because in the course of time the state has monopolized external compulsion, only state law (*staatliche Recht*) is…a legal order (*Rechtsordnung*) in the full sense of the word" (Mayer, 1903, p. 20). One can speak of "state law, that is: state-guaranteed law", the sociologist Max Weber (21.4.1864 – 14.6.1920) later wrote, "when and in so far as is practiced the guarantee of legal compulsion (*Rechtszwang*) by the specific – in the normal case therefore: directly *physical* – means of compulsion of the political community (*der politischen Gemeinschaft*)" (Weber, 1922, p. 370). Legal compulsion is, according to Weber (1922, p. 369), compulsion "solely to enforce observance of an arrangement as such…because it is taken to be binding"; the "means of compulsion (*Zwangsmittel*)" may be either "physical or psychological" (Weber, 1922, p. 372). "Where other means of compulsion than those of the political authority (*der politischen Gewalt*) are in view…and constitute the guarantee of a 'right', one should speak of 'extra-state' law…", Weber (1922, p. 371) said.

"The justification of the law and in particular the binding nature of the statute rests on the conformity of the legal norms with cultural norms whose binding nature the individual knows and acknowledges", Mayer (1903, p. 16) wrote in *Rechtsnormen und Kulturnormen*. He used the phrase "cultural norms" as "a collective name for the totality of those commands and prohibitions that are confronted by the individual as religious, moral, conventional, as demands of intercourse and of occupations" (Mayer, 1903, p. 17). "The form in which the culture or the society as the creator of the culture (*der Schöpfer der Kultur*) sets up (*aufstellt*) its demands (*Forderungen*) within the community is the cultural norm (*Kulturnorm*)", he wrote in 1922 (Mayer, 1922, p. 38).

[381] Legal norms and cultural norms.

[382] "Norms are rules for human behaviour, namely general or abstract rules…", he wrote in 1922. "Of course, the word has in linguistic usage a double meaning…". He quoted Felix Somló (1873 – 28.9.1920) on the "double meaning (*Doppelsinn*) of the word norm…" (Somló, 1917, p. 56): "The word norm has an 'is' and a 'should' meaning (*eine Seins- und eine Sollensbedeutung*). Norm in the first sense is the usually-happening (*das gewöhnlich Geschehende*), in the second the should-happen (*das Geschehensollende*)". Mayer (1922, p. 38) wrote that in legal theory (*Rechtslehre*) and legal philosophy the second meaning applies; here the norm is everywhere the expression of should and may".

"All statutes are directed to the administrators of the statutes (*Alle Gesetze wenden sich an die Verwalter der Gesetze*); the organs of the state that are appointed to administer the statutes are the sole addressees of the commands that the statute gives" (Mayer, 1903, p. 4). It is, Mayer (1903, p. 6) wrote, an "indisputable fact that the people do not know the legal propositions". "Of course everyone knows that it is forbidden to harm life and limb, the freedom and honour of others; each is aware that he must observe duties of all kinds, but this knowledge does not come from the statute..." (Mayer, 1903, p. 7). "That the statutes, even without being addressed to the people, are binding, this will seem to us justified if two conditions are actually realized in the given circumstances: [1.] that the individual knows and acknowledges (*kennt and anerkennt*) the cultural norms, [2.] that the legal norms agree with the cultural norms" (Mayer, 1903, p. 17). "If then the duties that accrue to the individual from the legal order are identical with the duties that are imposed on him by culture, he cannot complain that he is judged by norms that have not been communicated to him. Rather, each is judged according to statutes (*Gesetzen*) whose binding nature he has recognized; his recognition refers not only to the norm cast in legal form, but to the consonant which he has, from the culture in which he lives, learned to know" (Mayer, 1903, p. 17). "A culturally-alien statute (*kulturfremdes Gesetz*) cannot be maintained in the long run", however (Mayer, 1903, 23): "Only the statute which...is received by the culture is able to be a permanent component of the legal order".

"I have never asserted that every behaviour contrary to cultural norms (*kulturnormwidrige*) is contrary to law (*rechtswidrig*), only the act or omission *contradicting state-recognized cultural norms* is" contrary to law, Mayer (1908, p. 125) clarified in a later work.

According to Ehrlich (1917c, p. 205), "in the main, law is produced (*erzeugt*) by societal forces, not by the state":

> "As I have demonstrated in *Grundlegung der Soziologie des Rechts*, the fundamental legal institutions (*Einrichtungen*) of society: the most important corporate bodies (*die wichtigsten Körperschaften*), marriage, family, possession, contract, inheritance, are not created (*geschaffen*) by the state, but are older than the state. Their evolution (*Entwicklung*) is based on the inner motion of society and is in essence independent of the state. The greatest societal upheavals, from the barter to money economy and to capitalism and industrialism, have taken place by means of centuries of societal shifts (*Gesellschaftliche Verschiebungen*), and have their healthy legal expression in the arising (*Entstehen*) of new law, as new legal practices, forms of possession,

> contracts, modes of inheritance, in part without the intervention of the state, in part…wrested (*abgerungen*) by society from a reluctant state. The state has as a rule concerned itself therewith only after the evolution was completed or nearly completed".

"The societal order rests on the foundational societal institutions: marriage, family, possession, contract, inheritance. A societal institution (*Gesellschaftliche Einrichtung*) is not of course a physically tangible thing, like a table or a wardrobe. But it is nevertheless perceptible to the senses, in that the people standing in these societal relations direct themselves in their actions according to certain norms" (Ehrlich, 1922a, p. 2; 1922b, p. 131). The societal order "is not fixed, given…" (Ehrlich, 1922a, p. 13; 1922b, p. 139): "...it is in a perpetual flux: old institutions disappear, new appear, and the existing change continually their content". The legal order of societal institutions is "the primary legal order" (Ehrlich, 1916a, p. 584) and "a large part of the law directly originates in society: this is the inner order of societal relations, marriage, family, other societal associations, land-tenure, contracts, inheritances" (Ehrlich, 1920, p. 3). Most people believe that societal institutions – "marriage, family, corporations, possession, contracts, inheritance – have been called into life through legal propositions or even through statutes"; this is "quite wrong", Ehrlich (1922a, p. 12; 1922b, p. 138) said.

Ehrlich (1913, p. 376; 1936, p. 465) acknowledged that in the article *Das Gewohnheitsrecht und die sozialen Verbände*[383] (1905) by Stanislaus Dniestrzański[384] (13.11.1870 – 5.5.1935) there "are to be found at least in embryo (*im Keime*) some thoughts which are in some measure close to those propounded" by Ehrlich in *Grundlegung der Soziologie des Rechts* (1913). *Das Gewohnheitsrecht und die sozialen Verbände* (1905) was originally published in Ukrainian in

[383] Customary law and social associations.

[384] His name (Станіслав Дністрянський in Ukrainian) has been transliterated Stanislaus Dnistriańskyj (Dniestrzański, 1918, p. 19), Stanislaus Dnistrjanskyj (Dniestrzański, 1930, p. 257; 1935, p. 129) and Stanisław Dniestrzański (Hahn, 1912, p. 338) – in addition to Dniestrzański (1911, p. 1). On 19 April 1996 the Ukrainian Commission for Legal Terminology approved a "normative table designed to recreate Ukrainian proper names in the English language"; transliterated in accordance with that normative table, Станіслав Дністрянський is Stanislav Dnistrians'kyi and this transliteration is in fact used in an article published in a Ukrainian law journal in 2012 on the "main tenets" of "Stanislav Severynovych Dnistrians'kyi...concerning the origin of law and the state..." (Koval', 2012, p. 78). (Severynovych is his patronymic.) See Mantl (2007, p. 173-176) for a short biography of Dniestrzański (in German) and Hahn (1912, p. 338-339) for further biographical information (in Polish). See also the article by Koval' (2012, p. 74-78), in Ukrainian, and the profile, also in Ukrainian, on the following page on the website of the Ternopil Oblast Library for Youth (Dniestrzański was born in Tarnopol in Austrian Galicia (now Ternopil, Ukraine)): http://www.yl.edu.te.ua/index.aspx?res_xml=Online/Famous/sci/sci14.xml&num=3&res_xsl=Online/Famous/sci.xsl

1902[385]. In *Das Gewohnheitsrecht und die sozialen Verbände* (1905/1902) "I established the concept of social assocations (*sozialen Verbände*) and brought it into direct relation with that of customary law", Dniestrzański wrote in 1930 (p.266). Ehrlich, he said, "begins...with the theory of 'societal' associations (*‚Gesellschaftlichen' Verbände*), which he certainly devised independently of my article on customary law (1902 and 1905 respectively), yet essentially in the same sense as I". "My article was admittedly only a little sketch...", Dniestrzański (1930, p. 266) added modestly. "Every social association (*soziale Verband*) has its own legal order (*Rechtsordnung*)…", Dniestrzański (1906, p. 96) wrote in *Das Gewohnheitsrecht und die sozialen Verbände* (1905/1902). He summarized the article's main points in 1906 (Dniestrzański, 1906, p. 100):

> "Every community, every social association (*soziale Verband*) – from the least, the family, up to the highest, the state – has its own legal order. Every legal order is based on the socio-ethical principles of social associations. The law in *abstracto*[386] is an ethical minimum – ethical not in the sense of individual ethics, but in the sense of social ethics; the minimum not taken qualitatively, but quantitively.
>
> The legal order of the state is however through its strictly-organized administrative apparatus superior to the legal orders of other communities. The state takes supreme direction (*Oberleitung*) and control over the latter.
>
> It absorbs into its organism many legal determinations from other associations and bestows on them through statutory sanction the authoritative mark of the state community. Much however remains reserved to the lower-order social associations…".

"Those socio-ethical principles, which have received the authoritative mark of a social association, constitute the law (*das Recht*) of this association"[387] (Dniestrzański, 1906, p. 101).

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[385] Звичаєве право а соціальні зв'язки. Причини до пояснення §10 австрійської книги законів цивільних. *Часопись правнича і економічна*, 3(4-5), 1-42. The *Часопись правнича і економічна* – Legal and Economic Journal – was a Ukrainian-language law and economics journal published in Lemberg in Austrian Galicia (now Lviv, Ukraine). See Vasylyk (2011) for information on this academic journal.

[386] "This corresponds to…law in the objective sense" (Dniestrzański, 1906, p. 100).

[387] Those socio-ethical principles are, however, "not state law (*staatliches Recht*)" until or unless they "receive state sanction" …" (Dniestrzański, 1906, p. 101).

"Law in the juridical sense is in general everything that people living together in any community mutually recognize as a norm and rule of this coexistence"[388], Ernst Rudolf Bierling (7.1.1841 – 8.11.1919) wrote in 1894 in volume 1 of *Juristische Prinzipienlehre*[389] (Bierling, 1894, p.19). The subject of an earlier study, published as volume 1 of *Zur Kritik der juristischen Grundbegriffe*[390] (1877), had been "to determine the nature of positive law (*positiven Rechts*) itself, its effectiveness, its binding power" (1877, p. 162) and his definition of law and his theory of recognition (*Anerkennung*) followed from that study. Through recognition "a norm becomes 'valid', with its validity 'consisting' in the fact that people actually act in such a way that their conduct is intelligible according to the norm called the law" (Voegelin, 2003, p.94-95). Bierling's theory of recognition has been explained as follows (Babb, 1938, p. 573):

> "If a truth, completely formulated in the consciousness of *A*, is assimilated or appropriated in the consciousness of *B*…it is said to be acknowledged by *B*. This acknowledgment need not always and everywhere be voluntary. It may be constrained by force. It is not necessarily conscious acknowledgment".

Bierling distinguished between direct and indirect recognition (Voegelin, 2003, p.91), defining indirect recognition (*indirecten Anerkennung*) as "an implicitly-expressed recognition of the consequences in the recognition of the premises"[391] (Bierling, 1883, p.360). He said that "one who recognizes *a* norm referring to *other* norms also recognizes at the same time *those* norms (even those in the future) to which that *one* norm refers..." [392]. "If only this one proposition (this one norm) is recognized, that arrangements (*Anordnungen*) of certain persons in the state shall bind the national comrades, so are recognized with it all following arrangements of this type, so long as that one proposition is recognized", he explained (Bierling, 1883, p.359).

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[388] „*Recht im juristischen Sinne ist im allgemeinen alles, was Menschen, die in irgend welcher Gemeinschaft miteinander leben, als Norm und Regel dieses Zusammenlebens wechselseitig anerkennen*".

[389] Doctrine of juridical principles.

[390] On the critique of fundamental juridical concepts. Volume 2 was published in 1883.

[391] „*...einer in der Prämissen-Anerkennung* implicite *ausgesprochenen Anerkennung der Consequenzen...*".

[392] „*...derjenige, welcher* eine *auf* andere *Normen verweisende Norm anerkennt, auch zugleich* die *Normen (auch die erst zukünftigen) mitanerkennt, auf welche jene* eine *Norm verweist...*".

"A norm...must be recognized in the sense that people actually conform to it", Ehrlich (1913, p. 134; 1936, p. 167) wrote, but he added that "one must not comprehend" recognition as direct or indirect recognition "by every individual…as Bierling did". "The norms operate through the societal force that recognition on the part of a societal association imparts to them, not through recognition by each individual participant of the association", Ehrlich (1913, p.134; 1936, p.167) asserted. Bierling's theory of recognition "finds itself compelled to have recourse to fiction, after a highly questionable fashion, when, for instance, it supposes unconscious and involuntary recognition of law on the part of children, insane persons, and those ignorant of the law", Wilhelm Wundt (16.8.1832 – 31.8.1920) criticized (1901, p. 170). "Involuntary acknowledgement", Bierling unconvincingly argued, "is still acknowledgement, and this includes not only compelled or coerced, but also unconscious, involuntary acknowledgement" (Voegelin, 2003, p.94).

"The rules that people themselves observe as binding for them in their coexistence are the living law (*das lebende Recht)*", Ehrlich wrote in the article *Gesetz und lebendes Recht*[393] (1920). These "rules…as much constitute a legal order as that contained in the statute books" (Ehrlich, 1920, p.9). "The difference" between these legal orders is that the living law "asserts itself in the voluntary actions of the parties" and the statutes "must be enforced in large part by courts and other authorities" (Ehrlich, 1920, p. 9). "The living law is…not specified (*festgelegte*) in legal propositions (*Rechtssätze*)…" (Ehrlich, 1913, p. 399). It is "not that which for example the courts in deciding a legal dispute recognize as binding from the content of documents, but only what the parties observe (*halten*) in life" (Ehrlich, 1913, p. 401).

"In part that which is put forward" by Ehrlich in his article *Die Erforschung des lebenden Rechts*[394] (1911) the Croatian jurist Valtazar Bogišić (7.12.1834 – 24.4.1908) had "already taught and even carried out in the 1870s" (Ehrlich, 1911a, p. 137) and from his empirical research Bogišić produced in the General Property Code for the Principality of Montenegro (1888) "a recognized masterpiece", Ehrlich (1911a, p. 142) said. Bogišić collected information on legal customs (*pravnih običaja*) in Dalmatia, Croatia, Slavonia, Bosnia, Herzegovina, Montenegro, Macedonia, Bulgaria (Ehrlich, 1967, p. 18) and Albania (Bogišić, 1874, p. xlix; Luković, 2008, p. 180). He "designed…an extensive questionnaire…and…based on the answers, which came to him from all of the regions inhabited by South Slavs, his work *Zbornik sadašnjih pravnih običaja u južnih Slovena*" [395] (1874) (Ehrlich, 1913, p. 375; 1936, p. 464).

[393] Statute and living law.

[394] The investigation of the living law.

[395] Collection of the current legal customs of the South Slavs.

Ehrlich had also read Bogišić's *Pravni običaji u Slovena – privatno pravo*[396] (1867) (Kojder, 2006, p. 22), which had initially been published in 1866 as an article (*O važnosti sakupljanja narodnijeh pravnijeh običaja kod Slovena*[397]) in the journal *Književnik*. The questionnaire – *Naputak za opisivanje pravnijeh običaja, koji u narodu živu*[398] – was published in the same volume of that journal (Bogišić, 1866, p. 600-613). It consists of 347 questions. When he was commissioned to draft the General Property Code Bogišić carried out a survey in 1873 of legal customs in Montenegro using a new questionnaire comprising 2,000 questions[399] (Bogišić, 1874, p. xlix; Luković, 2008, p. 181). The questionnaire was completed by "informants for particular areas of Montenegro" who were appointed by Prince Nikola, the Montenegrin ruler, and an appointed "informant for church relations" (Luković, 2009, p. 448). The informants were senior civil, military and religious officials. The General Property Code for the Principality of Montenegro[400] (Општи имовински законик за Књажевину Црну Гору; *Opšti imovinski zakonik za Knjaževinu Crnu Goru*) is, Ehrlich (1913, p. 376) wrote, "based on a very careful and methodical exploration of the South Slav legal customs, not just the very sparse legal propositions available, but above all the concrete legal relations and legal institutions". A French translation by Rodolphe Dareste (25.12.1824 – 24.3.1911) and Albert Rivière (5.9.1853 – 1928) of the General Property Code for the Principality of Montenegro was published in 1892. Dareste was one of the legal experts Bogišić had consulted when he was working on the General Property Code (Luković, 2008, p. 183). The General Property Code was also translated into German (1893), Spanish (1891), Italian (1900) and Russian (1901) (Šofranac, 2008). In Article 779 of the General Property Code for the Principality of Montenegro custom (обичај) was defined as "every rule which is maintained in national life and in judicial practice and which has not entered the number of the rules of written law"[401] (Dareste & Rivière, 1892, p. 212).

[396] Legal customs of the Slavs – private law.

[397] On the importance of collecting the popular legal customs of the Slavs.

[398] Instructions for describing the legal customs which live among the people.

[399] This research was not actually published until 1984, when it was published by the Montenegrin Academy of Sciences and Arts (*Crnogorska Akademija nauka i umjetnosti*) as "Legal customs in Montenegro, Herzegovina and Albania. Survey of 1873 (*Pravni običaji u Crnoj Gori, Hercegovini i Albaniji. Anketa iz 1873. g.*)".

[400] It was called a property (имовински; *imovinski*) code rather than a civil code because family law and inheritance law were not included (Šofranac, 2008, p. 2; Luković, 2009, p. 445). The General Property Code for the Principality of Montenegro was promulgated on 26 April 1888 and entered into force on 1 July 1888 (Luković, 2008, p. 175; Luković, 2009, p. 445).

[401] « *La loi entend par coutume toute règle qui se maintient dans la vie nationale et dans la pratique judiciaire, et qui n'est pas entrée au nombre des règles du droit écrit* ».

Ehrlich addressed in *Grundlegung der Sociologie des Rechts* (1913) "the allegation of borrowing" from Bogišić that had, he said, been "frivolously" (*leichtfertig*) made against him. Ehrlich (1913, p. 375-376; 1936, p. 465) denied that he owed to Bogišić "the basic thoughts (*Grundgedanken*) of my sociological works":

> "Bogišić was a veritable genius of the concrete, his questionnaire[402] is a masterpiece of understanding of the legal ideas and the orders of a backward society based on them. But general thoughts (*allgemeine Gedanken*) one would look for in vain from him.
>
> …
>
> He has supplied invaluable material, but not a processing I could have utilized of the material. At the same time his field of vision (*Gesichtkreis*) is rather narrow: it is limited entirely to the institutions peculiar to a primitive society. For the conditions of a higher civilization, of a richer life, of modern commerce he has not the slightest interest. Accordingly one may judge how far I have gone beyond Bogišić everywhere".

In his article *Das lebende Recht der Völker der Bukowina*[403] (1912) Ehrlich quoted the Spanish jurist Joaquín Costa (14.9.1846 – 8.2.1911). Costa's research on customary law in the Spanish region of Alto Aragón (*Derecho consuetudinario del Alto Aragón*) was first published in the journal *Revista general de legislación y jurisprudencia* between 1879 and 1880 (Cheyne, 1972, p. 32) and this study constituted in 1885 volume 1 of *Derecho consuetudinario y economía popular de España*[404]; volume 2 (1902), which Costa edited, was a collection of monographs by Costa and other authors. The first section of *Derecho consuetudinario del Alto Aragón* (1879-1880) ("Importance of the study of customary law (*Importancia del estudio del derecho consuetudinario*)") is a particularly useful theoretical discussion (Costa, 1879a, p. 141-153).

The "investigation of the living law"[405] is "in general…a problem which, if it to be solved satisfactorily, exceeds the abilities of the individual", Ehrlich (1920, p. 21) conceded. "It must be undertaken by state institutions". He proposed "combin[ing] institutes for ascertaining actual

[402] Ehrlich was referring to the 1866 questionnaire.

[403] The living law of the peoples of Bukowina.

[404] Customary law and popular economy of Spain.

[405] "The investigation of the living law (*Die Erforschung des lebenden Rechts*)" is also the title of chapter 21 of Ehrlich's Grundlegung der Soziologie des Rechts (1913).

legal conditions (*tatsächlicher Rechtszustände*) and the existing statistical institutes" (Ehrlich, 1920, p. 22). The existing statistical institutions were, he noted, "already concerned with surveys of conditions (*Zustandserhebungen*); but only so far as these are *countable* and *measurable*" (Ehrlich, 1920, p. 21). They did not "go into…underlying legal relations".

How does one differentiate the legal norms of the state (*die staatlichen Rechtsnormen*) and societal legal norms from other norms? "As difficult as it…is to draw scientifically the boundary between the legal norm (*Rechtsnorm*) and other types of norm, this difficulty exists only rarely in practice", Ehrlich (1913, p. 132) asserted:

> "The question of the contrast of the legal norm and the extra-legal norm is…a question….of societal psychology (*Gesellschaftlichen Psychologie*). The different types of norms arouse different tones of sentiment (*Gefühlstöne*) and we respond with different feelings to the transgression of different norms according to their type. Compare the sense of outrage that follows a breach of law (*Rechtsbruch*), with the anger toward a violation of a moral precept, with the vexation on the occasion of an impropriety, with the disapproval of tactlessness, with the ridiculousness when there is a failure of good form (*guten Tones*), and finally with the critical rejection which the heroes of fashion bestow upon those who are not on their level".

The "sentiment" jurists call "*opinio necessitatis*…is peculiar to the legal norm (*Rechtsnorm*)" (Ehrlich, 1913, p. 132; 1936, p. 165). "Compulsion (*Zwang*) is not a peculiarity of the legal norm (*Rechtsnorm*)", Ehrlich (1913, p. 50) believed. "The norms of convention, morality, religion, tact, of decorum, good form (*guten Tones*) and fashion would have no meaning if a certain compulsion did not proceed from them" (Ehrlich, 1913, p. 50; 1936, p. 62). These are "extra-legal societal norms (*den außerrechtlichen Gesellschaftlichen Normen*)…" (Ehrlich, 1913, p. 131; 1936, p. 164). Fashion, for example, "requires the subordination of one's own better conviction to that which is recognized as wrong – the sacrifice of the intellect (*sacrificium intellectus*) in matters of taste and suitability", von Jhering (1898, p.240) observed. "For courts other than the state organs of administration of law (*die staatlichen Organe der Rechtspflege*)", Ehrlich (1913, p. 105) wrote, "it is…no longer represented that they decide on the basis of legal propositions". Their decisions are "very frequently" based on extra-legal societal norms:

> "The state administrative authorities, the police, the disciplinary courts, the chairpersons of public representative bodies very frequently have to make findings exclusively on the basis of the norms of morality, convention, honour, decency, tact, etiquette. This applies even more to the extra-state courts (*außerstaatlichen Gerichten*)…".

Arbitration and disciplinary bodies are examples of "extra-state courts".

"The Court of Justice "is...reluctant to recognize custom as a source of law", Thijmen Koopmans (2000, p. 56), who was a Judge of the Court of Justice from 1 April 1978 to to 29 March 1990, commented in 2000. He illustrated this by referring to the Luxembourg Compromise of 29 January 1966 on majority decisions of the Council of Ministers[406]. The Court of Justice, he said, "never accepted the binding force" of the Luxembourg Compromise, "*whether or not* this agreement on decision-making in the Council had in fact resulted in a decision-making practice in conformity with it" (emphasis added). Pierre Pescatore (20.11.1919 – 2.2.2010), a Judge of the Court of Justice from 9 October 1967 to 7 October 1985, confirmed in 2006 that "the Luxembourg Compromise was not considered a legitimate part of the legal order [of the Community]...by...the Court of Justice..." (Pescatore, 2006, p. 244). The Court of Justice, in Case 68/86 United Kingdom of Great Britain and Northern Ireland v. Council of the European Communities [1988] ECR 855, "pointed out" in paragraph 38 that "the rules regarding the manner in which Community institutions arrive at their decisions are laid down in the Treaty and are not at the disposal of the member states or of the institutions themselves (*les règles relatives à la formation de la volonté des institutions communautaires sont établies par le traité et qu'elles ne sont à la disposition ni des États membres ni des institutions elles-mêmes*)". "A mere practice on the part of the Council cannot derogate from the rules laid down in the Treaty (*Une simple pratique du Conseil n'est pas susceptible de déroger à des règles du traité*)"[407], the Court held in paragraph 24.

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406 "Where, in the case of decisions which may be taken by majority vote on a proposal of the Commission, very important interests of one or more partners are at stake, the members of the Council will endeavour, within a reasonable time, to reach solutions which can be adopted by all the members of the Council...

With regard to the foregoing paragraph , the French delegation considers that where very important interests are at stake the discussion must be continued until unanimous agreement is reached.

The six delegations note that there is a divergence of views on what should be done in the event of failure to reach complete agreement" (Commission of the European Economic Community, 1966, p. 32).

407 The French text is included here for the purpose of comparison.

The "Luxembourg Compromise" was described in an article by Anthony Teasdale, then a Director in the European Parliament's Directorate-General for Internal Policies of the Union, published in 1993 in the *Journal of Common Market Studies* (Teasdale, 1993, p. 567):

> "The Luxembourg Compromise was an informal arrangement...whereby a decision requiring majority voting in the Council of Ministers could be postponed until unanimous agreement had been reached. Its effect was to create a national veto over all key EC decisions, and for almost two decades it stalled progress in many important areas…".

"Although some governments claim that the Luxembourg Compromise still exists, it did in fact disappear during the course of the 1980s...", Teasdale (1993, p. 567) said in this article. In a written answer to the House of Lords on 23 November 2011, however, the British Government said that the Luxembourg Compromise "remains in place following the entry into force of the Lisbon Treaty"[408]! The Luxembourg Compromise was described in that written answer as "a convention that the Council will not force through an act by qualified majority vote against the will of a member state which believes its vital national interests to be at stake". "Each country should be left to decide for itself" whether or not an "important national interest is at stake", the then Foreign Secretary told the House of Commons on 22 June 1982[409]. The Council of the European Union, in its reply of 12 February 2002 to written question P-2887/01 of 11 October 2001 on the "Luxembourg Compromise" , told the European Parliament that "the conclusions of its extraordinary session in Luxembourg on 17, 18, 27 and 28 January 1966 which are commonly referred to as the Luxembourg Compromise...do not prevent it from taking decisions in accordance with the Treaties" and the Council noted "the fact that the Treaties in many instances provide for majority decisions..." (OJ C 134 E, 6.6.2002, p. 134).

In its judgement of 6 May 2008 in Case C-133/06 European Parliament v. Council of the European Union [2008] ECR I-3189 the Grand Chamber of the Court of Justice said in paragraph 41 that the case-law of the Court of Justice "shows that the Court of Justice is not necessarily indifferent to the practices followed by [the] institutions" of the Union. The Grand Chamber cited paragraphs 48 and 49 of the judgement of 10 February 1983 of the Court of

[408] Official Report, House of Lords, 23 November 2011; Vol. 732, c. WA 244. http://www.publications.parliament.uk/pa/ld201011/ldhansrd/lhan227.pdf

[409] Official Report, House of Commons, 22 June 1982; Vol. 26, c. 159.

Justice in Case 230/81 Grand Duchy of Luxembourg v. European Parliament [1983] ECR 255 in which the Court had "declared" that the European Parliament, "in confirming" in a resolution "the practice of the Parliament, developed in the exercise of its independent powers (*dans le cadre de son autonomie*), to hold meetings of its committees and political groups in Brussels", had not "exceeded its powers (*compétence*)". The "practice", the Court explained, had "never been called in question (*à aucun moment été mise en cause*) by any member state"[410]. "Admittedly, a mere practice cannot derogate from" the rules of the Treaty establishing the European Community, the Grand Chamber said in paragraph 41 of its judgement of 6 May 2008. Why should the Court of Justice be "indifferent" to extra-state law that is not inconsistent with Union law if the Court of Justice is "not necessarily indifferent" to practices followed by the institutions of the Union that do not derogate from the rules of the Treaty on European Union and the Treaty on the Functioning of the European Union?

Free law is "all law that is not formal law (*förmliches Recht*), i.e. statute or formulated customary law (*Gesetz oder formuliertes Gewohnheitsrecht*)" (Kantorowicz, 1911c, c. 352). Extra-state law is free law.

[410] The French text is included here for the purpose of comparison.

Chapter 8

In the introductory chapter of this thesis the following questions were raised:

1. Is the European Union a state?
2. In the Union is law, the statute or the judge pre-eminent?
3. What is "the law" in the European Union?
4. Does the judge "simply" do what he or she has been instructed to do by the legislature?
5. Is discretion "necessary"?
6. Does the Court of Justice of the European Union engage in law-creation (*Rechtsschöpfung*)?
7. Did the establishment by the Court of Justice of the constitutional principles of precedence (*Vorrang*), direct effect, state liability and the protection of fundamental rights exceed the limits to the "further development of law (*Rechtsfortbildung*)"?
8. Does the Court of Justice of the European Union have "a free law attitude"?
9. Could an appropriate position (*eine entsprechende Stellung*) be provided to societal legal norms without contravening the principle of legal certainty?

This chapter will suggest answers to each of those questions based on what has been discussed in the previous chapters.

"The member states remain masters of the Treaties", the German *Bundesverfassungsgericht* concluded in paragraph 298 of its decision of 6 July 2010 in 2 BvR 2661/06 on the Treaty of Lisbon. The *Bundesverfassungsgericht* said in paragraph 231 that the "empowerment" of the Union "to exercise…competences…comes from the member states. They *therefore permanently* remain the masters of the Treaties" (emphasis added). If the member states are the masters of the Treaties they are masters only in the sense that they can amend the Treaties – and the Treaties may only be amended in accordance with one of the revision procedures in Article 48 of the Treaty on European Union. The Court of Justice, because it is master of the interpretation of the Treaties, is master of the Treaties as they are. It also has jurisdiction under Article 19 paragraph 1 of the Treaty on European Union to "ensure that...the law is observed".

In Article 19 of the Treaty on European Union – and "Article 19 is only the renumbering of a provision which has been there since the 1950s – reference is made to a concept of 'the law' which *transcends* the Treaties, because it is 'in the interpretation and application of the Treaties' (that is, the primary law of the Union) that 'the law' must be observed", the Vice-President of the Court of Justice of the European Union, Koen Lenaerts (2013a), said during a lecture he gave on 6 July 2013 at the European University Institute in Florence (emphasis added). The phrase "Union law (*droit de l'Union*) refers…to a corpus of legislation and case-law similar to (*assimilé à*) that of a state", Allan Rosas and Egils Levits, both Judges of the Court of Justice, and Yves Bot, an Advocate General of the Court of Justice, wrote in their foreword to a book published in 2013 "to mark the sixtieth anniversary of the Court of Justice" (Rosas, Levits & Bot, 2013, p. vii). In the European Union "the law" is not simply the legislation and case-law of the Union or the legislation and case-law of the Union in combination with the legislation and case-law of the member states. "The state-based perception of law (*Die staatliche Rechtsauffassung*)" (Ehrlich, 1917c, p. 205) is a misperception.

The Union is a state[411]. The member states of the Union are also states but, as Jörg Gerkrath (2014, p. 115) of the University of Luxembourg has noted, the stateness (*Staatlichkeit*) of a member state of the Union "differs from that of an independent" state; the member states have what he describes as the "status" of "integrated states". He argues that Article 4 of the Treaty on European Union (JO C 83 du 30.3.2010, p. 18; ABl. C 83 vom 30.3.2010, S. 18) "covers the fundamental elements" of this "status" (Gerkrath, 2014, p. 115). In those member states that are federal states the federated states are also states[412].

To quote Ehrlich (1903, p. 32), "not all production of law (*Rechtserzeugung*) is reserved to the state…". "The law is not identical with the totality of written statutes (*Das Recht ist nicht mit der Gesamtheit der geschriebenen Gesetze identisch*)", the *Bundesverfassungsgericht* declared in its decision of 14 February 1973 in BVerfGE 34, 269, 287. "The law" is also not definable as "what the courts enforce" (Kantorowicz, 1958, p. 61). "In reality," as Kantorowicz (1958, p. 86) said, "state-made law is only one of the many forms of law obtaining in a state…".

[411] The Union is a non-sovereign state.

[412] See, for example, the decision of 23 October 1951 of the German *Bundesverfassungsgericht* in BVerfGE 1, 14, 34: "The *Länder* are, as members of the federation, states with their own –although objectively limited – supreme state power that is not derived from the federation but recognized by it (*Die Länder sind als Glieder des Bundes Staaten mit eigener – wenn auch gegenständlich beschränkter – nicht vom Bund abgeleiteter, sondern von ihm anerkannter staatlicher Hoheitsmacht*)". Countries is the accurate translation of the German term *Länder*. There are sixteen *Länder* of the Federal Republic of Germany.

The "most accurate characterization" of the Court of Justice "is that of a hybrid court performing both the functions of a supreme and a constitutional court", the President of the Court of Justice, Vassilios Skouris (2004, p. 3), stated at a conference in Bled in 2004. The Court of Justice is, he said, the constitutional and supreme court of the European Union (Skouris, 2004, p. 4). At a conference in Berlin in 2005 the then President of the Court of First Instance of the European Communities[413], Bo Vesterdorf (2006, p. 83), said that the Court of Justice "performs the duties of a constitutional court"[414] but, because it "has wider duties than pure constitutional adjudication, I also think that it looks more like a supreme court…".

The free law doctrine (Kantorowicz, 1934b, p. 1241; 1934a, p.232-233; 1928, p. 694-697) provides a descriptive framework for the case-law of courts. The "interpretations" that established the constitutional principles of the precedence of Union law, direct effect, state liability and the protection of fundamental rights are "desired explicit law" according to Kantorowicz's 1927/1928 schema (Kantorowicz, 1928, p. 695) and, in his 1934 schema, "free statutory law, desired" (Kantorowicz, 1934a, p. 233). They are "interpretations" of the primary law of the Union that "cannot be strictly deduced from it and in fact are nothing but" the primary law of the Union "as the interpreter desires it to be" (Kantorowicz, 1928, p. 695). The principles of the precedence of Union law, direct effect, state liability and the protection of fundamental rights were "created" by the Court of Justice (Zuleeg, 2001, p. 1) through its case-law and chapter 4 described how each of those principles was created.

The creation by the Court of Justice of the constitutional principles of the precedence of Union law, direct effect, state liability and the protection of fundamental rights did exceed the limits to the further development of law (*Rechtsfortbildung*) outlined by the German *Bundesverfassungsgericht* in its decision of 6 July 2010 in 2 BvR 2661/06 but the *Bundesverfassungsgericht* itself also frequently exceeds those limits – as do all constitutional courts and supreme courts. In the European Union and in its member states the judiciary and not the statute or "the law" is pre-eminent. The Union is a *Richterunion* – a judge-governed union – and its member states *Richterstaaten*[415].

[413] Now the General Court of the European Union.

[414] According to the Venice Commission of the Council of Europe "the power to review the constitutionality" of statutes "and other normative acts (government decrees etc.) and in case of unconstitutionality, to annul them...is a *sine qua non* of being a constitutional court" (Venice Commission, 2002, p. 4).

[415] Judge-governed states. See the article *Rechtsstaat – Richterstaat* by the then President of the German Federal Court (*Bundesgerichtshof*), Günter Hirsch, published in the *Frankfurter Allgemeine Zeitung* on 30 April 2007 and available online at http://www.faz.net/aktuell/politik/die-gegenwart-1/recht-und-politik-rechtsstaat-richterstaat-1435378.html?printPagedArticle=true

In an article in the German news magazine *Der Spiegel* on 30 November 1992 Norbert Blüm (1992, p. 107), the then Federal Minister for Labour and Social Order in Germany, wrote:

> "The ECJ has without a doubt the right to further develop law (*Rechtsfortbildung*). It has however overstretched (*überdehnt*) that for itself up to free law-creation (*freien Rechtsschöpfung*), so that the question of an unlawful violation of the separation of powers principle at the expense of the politically accountable legislature now obtrudes. According to Community law only the ECJ itself can give a binding answer. A vicious circle?"

The premise of Blüm's allegation is that the free creation of law by judges is unlawful and inadmissible. He must not have been familiar with the case-law of the German *Bundesarbeitsgericht*[416].

Montesquieu, in *De l'esprit des lois* (1748), wrote that judges are "only the mouth that pronounces the words of the statute (*la loi*); inanimate beings who can moderate neither its force nor its rigor" (Laboulaye, 1877, p. 18). This was quoted on 4 December 2002 by the then President of the European Commission, Romano Prodi, in his speech on the 50th anniversary of the Court of Justice; in his name and in that of the Commission he thanked the judges of the Court of Justice "for having done the opposite"[417] (Prodi, 2002a, p. 4). It would be "quite impossible" for judges to be what Montesquieu described, Adams, de Waele, Meeusen & Straetmans (2013, p. 2) wrote, "because although judicial decisions should be grounded in an elaboration of relevant legal texts, the precise meaning and relevance of those texts are themselves subject to debate". "In addition", they said, "the law is increasingly interlinking different sets of interests, so as to address ever more complex societal problems and issues" and consequently "in individual cases, courts can no longer confine themselves to applying the legal rules as established by the legislator" and are "expected to weigh and reconcile the relevant interests themselves".

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[416] Federal Labour Court. The *Bundesarbeitsgericht* is, under Article 95 of the *Grundgesetz*, one of five federal supreme courts of the Federal Republic of Germany. Two examples of "free law-creation" by the *Bundesarbeitsgericht* are mentioned later in this chapter.

[417] Prodi (2002c, p. 2; 2002d, p. 2), according to the published English and Portuguese texts of his speech, said that the Court of Justice had "established (*estabeleceu*)" the principles of the precedence of Community law, its direct effect and its invocability before national courts. The Italian and Spanish texts, however, do not say that the Court of Justice "established" those principles; those principles had instead been "affirmed (*affermato*; *afirmado*)" by the Court of Justice, according to those texts (Prodi, 2002a, p. 2; 2002b, p. 2)!

Article 2 paragraph 2 of Eugen Huber's preliminary draft of 15 November 1900 of the Swiss Civil Code[418] provided that a "local practice…that would…nullify or modify in any way at all the provisions of the statute" would not be "recognized" as customary law[419] (Département fédéral de justice et police, 1900, p. 5). Huber (1914, p. 37) explained that "doubts…can arise, which are better met from the outset" by providing that "if a custom (*Gewohnheit*) contrary to the statute were to be formed in any part of the legal territory supplanting the posited law, in any such case or expressly to protect to statute the local custom will not be recognized"[420]. For some reason this provision was omitted from the draft of 28 May 1904 of the Swiss Federal Council (Huber, 1914, p. 37) and not included in the Swiss Civil Code as enacted.

Article 2 paragraph 2 of the preliminary draft of 15 November 1900 of the Swiss Civil Code proposed the pre-eminence of the statute. A resolution adopted on 23 November 2007[421] by the Parliamentary Assembly of the Council of Europe (2007a, p.1) "underlines (*souligne*)" that the concept of the "pre-eminence of law (*prééminence du droit*)" is a substantive legal concept and "pre-eminence of law" should not be interpreted as "supremacy of statutory texts".

The pre-eminence of the constitution of the state could be specified in recognizing extra-state law but this could only be acceptable if the constitution provides for the protection of fundamental rights and if the courts – in particular, the constitutional court or the court of last instance – will protect those rights.

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[418] Huber was the editor of the preliminary draft (*Vorentwurf*; *avant-projet*) (BBl. 1904, IV, 3; FF 1904, IV, 4).

[419] "The formation of a customary law that would as local practice (*Ortsübung*) nullify or modify in any way at all the provisions of the statute is not recognized (*Nicht anerkannt wird die Bildung eines Gewohnheitsrechtes, das als Ortsübung die Bestimmungen des Gesetzes in irgend einer Weise aufheben oder abändern würde*)". The published French text states: "Local usages tending to evade or to modify the civil statute will not be recognized as customary law (*Ne seront pas reconnus comme droit coutumier les usages locaux tendant à éluder ou à modifier la loi civile*)" (Département fédéral de justice et police, 1900, p. 4). (The term "evade" was used in the sense of to "defeat the intention of…" (Concise Oxford English Dictionary, 11th ed., p. 493))

[420] „*Und wenn eine Gewohnheit gegen das Gesetz sich in einem Teile des Rechtsgebietes unter Verdrängung des gesetzten Rechtes auszubilden vermöchte, so wäre in einem solchen Falle das Gesetz ausdrücklich zu schützen oder also die lokale Gewohnheit nicht anzuerkennen*". In the French text, "If…a custom contrary to the statute were established (*s'établissait*) in any part of the country and it supplanted the written law, it is important to expressly assure the empire of the statute by declaring that the local usage will not be recognized" (Huber, 1901, p. 31).

[421] Resolution 1594 (2007).

The *Lei Básica*[422] of the Macau Special Administrative Region of the People's Republic of China entered into force when China assumed "the exercise of sovereignty over" Portuguese-administered Macau on 20 December 1999[423]; it is the constitution of Macau[424]. According to Article 11 paragraph 2 of the Portuguese text[425] of the *Lei Básica*: "No statute, statutory decree, administrative regulation or normative act of the Macau Special Administrative Region may contravene this statute"[426]. Article 8 provides: "The laws, statutory decrees and other normative acts previously in force in Macau are retained, save wherein they contradict[427] (*contrariar*) this statute [i.e., the *Lei Básica*] or wherein they are subject to amendments in conformity with legal procedures by the legislative organ or by other competent organs of the Special Administrative Region of Macau"[428]. "In a formal hierarchical perspective it is quite clear" that the *Lei Básica* "overrules the other normative sources that are specific" to Macau, Jorge Bacelar Gouveia (2009, p. 698) of the Universidade Nova de Lisboa said at an academic conference in Macau in February 2007:

> "…pre-existing laws…are only applicable so long as they are compatible with the new [*Lei Básica*]. Where this is not the case, they cease to have effect.
>
> With respect to later laws, the [*Lei Básica*] is the new criterion for the validity of the entire legal system of this territory…".

[422] Basic statute is the literal translation but the accepted translation is Basic Law; the Portuguese word for "law" is *direito*. The *Lei Básica* replaced the *Estatuto Orgânico de Macau* of 17 February 1976: http://bo.io.gov.mo/bo/i/76/09/eo/pt/default.asp

[423] See the Joint Declaration of 13 April 1987 of the Government of the Portuguese Republic and the Government of the People's Republic of China on the question of Macau: http://bo.io.gov.mo/bo/i/88/23/dc/pt/default.asp

[424] The *Lei Básica* has "constitutional rank" in Macau (Neuwirth & Min, 2012, p. 645).

[425] Chinese and Portuguese are the official languages of Macau. For the Portuguese text of the *Lei Básica* see http://bo.io.gov.mo/bo/i/1999/leibasica/index.asp

[426] "*Nenhuma lei, decreto-lei, regulamento administrativo ou acto normativo da Região Administrativa Especial de Macau pode contrariar esta Lei*".

[427] "To be contrary to in effect, character, etc.; to be directly opposed to; to go counter to, go against": http://www.oed.com/view/Entry/40357

[428] "*As leis, os decretos-leis, os regulamentos administrativos e demais actos normativos previamente vigentes em Macau mantêm-se, salvo no que contrariar esta Lei ou no que for sujeito a emendas em conformidade com os procedimentos legais, pelo órgão legislativo ou por outros órgãos competentes da Região Administrativa Especial de Macau*".

Chapter III of the *Lei Básica* lists the fundamental rights protected by the *Lei Básica* and under Article 41 the residents of Macau "enjoy the other rights and freedoms ensured by the statutes (*leis*)" of Macau[429]. Article 11 paragraph 1 of the *Lei Básica* prescribes that "the system for guaranteeing" the fundamental rights of the residents of Macau is "based on the provisions" of the *Lei Básica* (i.e., not on Chinese law). Article 40 paragraph 2 of the *Lei Básica* provides that the "rights and freedoms" enjoyed by the residents of Macau "may not be restricted except in cases provided for in statute (*previstos na lei*)" and such "restrictions may not contradict (*contrariar*) the provisions of the preceding paragraph of this article". According to Article 40 paragraph 1:

> "The provisions, that are applicable to Macau, of the International Covenant on Civil and Political Rights[430], of the International Covenant on Economic, Social and Cultural Rights[431], as well as of international labour conventions, continue in force and are applied through statutes (*aplicadas mediante leis*) of the Special Administrative Region of Macau".

Macau has a separate courts system comprising courts of first instance, a Court of Second Instance and a Court of Last Instance (*Tribunal de Última Instância*)[432] but legal experts in Macau regard the Court of Last Instance as having "adopted a timid role in protecting fundamental rights…" (Godinho & Cardinal, 2014, p. 618). Fortunately, that cannot be said of the Court of Justice of the European Union.

In its advisory opinion of 4 December 1935 on the Consistency of Certain Danzig Legislative Decrees with the Constitution of the Free City (PCIJ, Series A/B, No. 65) the Permanent Court of International Justice observed that provisions concerning "fundamental rights" were "designed to fix the position of the individual in the community, and to give him the safeguards which are considered necessary for his protection *against the state*" and that "the words 'fundamental rights' (*Grundrechte*)" had "always been understood...in that sense…" (emphasis added). "This type of application is referred to as the vertical effect of fundamental rights",

[429] "The right to life (*Direito à vida*)", interestingly, is not "ensured" by the *Lei Básica* but by Article 70 of the Civil Code (*Código Civil*) approved on 3 August 1999: http://bo.io.gov.mo/bo/i/99/31/codcivpt/codciv0001.asp

[430] https://treaties.un.org/doc/Publication/UNTS/Volume%20999/volume-999-I-14668-English.pdf

[431] https://treaties.un.org/doc/Publication/UNTS/Volume%20993/volume-993-I-14531-English.pdf

[432] See Article 84 of the *Lei Básica*.

Eliska Wagnerova, the Vice-President of the Constitutional Court of the Czech Republic, said at a seminar in Portugal in 2005 organized by the Venice Commission of the Council of Europe. "More recently", she said, "there has been a trend toward extending the reach of the fundamental rights further, to include the private-law sphere of relations between individuals" (Wagnerova, 2006, p. 125). This is referred to as "horizontal effect" (Wagnerova, 2006, p. 125) or "third-party effect" (*Drittwirkung* in German) (Butt, Kübert & Schultz, 2000, p. 10). With respect to third-party effect a "distinction" is made between "direct" third-party effect and "indirect" third-party effect, i.e., "whether the whether the fundamental right has legal effect directly or only indirectly, for instance in the form of an interpretation…in conformity with the fundamental right (*grundrechtskonforme Auslegung*)"[433] (Butt, Kübert & Schultz, 2000, p. 10).

Hans Carl Nipperdey (21.1.1895 – 21.11.1968) is "the father of the doctrine of direct third-party effect..."[434] (Starck, 2001, p. 98). Nipperdey was President of the German *Bundesarbeitsgericht* from 12 April 1954 to 31 January 1963 and in its judgement of 3 December 1954 in BAGE 1, 185 the *Bundesarbeitsgericht* held that "the fundamental right of freedom of expression…would be made ineffective in large areas of human life, if not the state but economic and social forces and individuals in private legal relations were in a position to restrict this right at their discretion by virtue of their powerful position, without thereby making themselves guilty of a constitutional infringement (*Verfassungsverletzung*)"[435]. The Court, "under the influence of…Nipperdey", had "declared that freedom of expression had…*unmittelbare Drittwirkung*", direct third-party effect (Markesinis & Unberath, 2002, p. 407). On 15 January 1955 in BAGE 1, 258 the *Bundesarbeitsgericht* under Nipperdey "ruled that wage discrimination against women by private employers was prohibited by virtue of the constitutional provision requiring equal rights for women" (Oeter, 1994, p. 11).

[433] Indirect third-party effect "exists when private-law obligations are interpreted with regard to public-law fundamental rights..." (Engle, 2009, p. 166).

[434] See Vogenauer (2006, p. 637-638) for a short biography of Nipperdey.

[435] „*Denn das Grundrecht der freien Meinungsäußerung, das wesentlich ist für eine freiheitliche soziale Gestaltung des Gemeinschaftslebens, würde auf weiten Gebieten des menschlichen Lebens wirkungslos gemacht werden, wenn zwar nicht der Staat, wohl aber wirtschaftliche und soziale Mächte und einzelne im privaten Rechtsverkehr in der Lage wären, dieses Recht nach ihrem Gutdünken kraft ihrer Machtstellung einzuschränken, ohne sich dabei einer Verfassungsverletzung schuldig zu machen*".

In Spain the fundamental rights recognized by the Spanish Constitution have direct third-party effect (Oliver, 2008, p. 11) and the Constitution of Greece states that the "rights of the human being as an individual and as a member of…society… apply to the relations between individuals to which they are appropriate" and "are guaranteed by the state" (Mavrias & Spiliotopoulos, 2004, p. 41-42).

In 2012 von Bogdandy et al. proposed in an article published in the *Common Market Law Review* "a 'reverse' *Solange* doctrine". There has been, they wrote, "scant European Union action" when there have been "serious fundamental rights violations in the member states" and defending "the Union's foundational values (Art. 2 TEU) is largely left to national and international institutions" (von Bogdandy et al., 2012, p. 490). The authors of the article argued that the *Solange* doctrine of the German Federal Constitutional Court (*Bundesverfassungsgericht*) "should be taken up" by the Court of Justice of the European Union "and turned towards the member states…" (von Bogdandy et al., 2012, p. 508). The authors quoted paragraph 42 of the judgement of 8 March 2011 of the Court of Justice of the European Union in Case C-34/09 Gerardo Ruiz Zambrano v. Office national de l'emploi (ONEm) [2011] ECR I-1177, in which the Court held that Article 20 of the Treaty on the Functioning of the European Union "precludes national measures which have the effect of depriving citizens of the Union of the genuine enjoyment of the substance of the rights conferred by virtue of their status as citizens of the Union". They proposed defining "this 'substance' with reference to the essence of fundamental rights enshrined in Article 2"of the Treaty on European Union and applying this "standard…to public authority *throughout* the European legal space" (von Bogdandy et al., 2012, p. 490). "Consequently, a violation by a member state, even in purely internal situations, can be considered an infringement of the substance of Union citizenship". This would be "a 'reverse' *Solange* doctrine, applied to the member states from the European level" (von Bogdandy et al., 2012, p. 490):

> "…beyond the scope of Article 51(1) [of the Charter of Fundamental Rights of the European Union] member states remain autonomous in fundamental rights protection *as long as* it can be presumed that they ensure the essence of fundamental rights enshrined in Article 2 [of the Treaty on European Union]. However, should it come to the extreme constellation that a violation is to be seen as *systemic*, this presumption is rebutted. In such a case, individuals can rely on their status as Union citizens to seek redress before national courts".

The authors deliberately "limit" their "approach" to "one value" of Article 2 of the Treaty on European Union, "respect for human rights" (von Bogdandy et al., 2012, p. 503). "In the words of Article 2" of the Treaty on European Union, they wrote, "the Union 'is founded on' *inter alia* 'respect for human rights'. This constitutes a legal standard that applies to *any* exercise of public authority in the European legal space, be it by the Union or the member states" (von Bogdandy et al., 2012, p. 509). They pointed out that the Treaty of Lisbon "subjects" Article 2 of the Treaty on European Union to the jurisdiction of the Court of Justice "and thus to its mandate to ensure that 'the law is observed'…" (von Bogdandy et al., 2012, p. 516). The proposal is flawed because it assumes that national judges will make references to the Court of Justice under Article 267 of the Treaty on the Functioning of the European Union (von Bogdandy et al., 2012, p. 514-516). The authors state that the "presumption" that a member state is protecting "the essence of fundamental rights" cannot be "rebutted…by *simple and isolated* fundamental rights infringements" (von Bogdandy et al., 2012, p. 513) (emphasis added). Only "violations of the essence of fundamental rights which in number or seriousness account for *systemic* failure and are not remedied by an adequate response within the respective national system" can rebut the "presumption of compliance". The "approach" of the authors, as they themselves acknowledged, "fails to include third-country nationals as it is based on Union citizenship"[436] (von Bogdandy et al., 2012, p. 516). Their proposal "privileges Union citizens to the extent that only they can introduce individual legal actions to challenge systemic deficiencies" (von Bogdandy et al., 2012, p. 517).

The validity (*Gültigkeit*) of a norm is contingent on its material lawfulness (*materielle Rechtsmäßigkeit*). A norm that contravenes the fundamental rights of the individual is not and cannot be materially lawful. "Even terrorists have rights (*Auch Terroristen haben Rechte*)", Kai Ambos (2011,p. 6), a professor at the University of Göttingen and a judge of the *Landgericht* Göttingen, correctly stated in an article published in the *Frankfurter Allgemeine Zeitung* on 5 May 2011. For a societal legal norm to be valid it must be materially lawful and not inconsistent with the legislative acts of the state[437]. The legislative acts of the state must themselves be materially lawful.

[436] "…it could be seen as morally attractive to conceive of an approach which also includes third-country nationals. This would however imply a much bigger step than our proposal…" (von Bogdandy et al., 2012, p. 517).

[437] In Austria Section 6 paragraph 2 of the *Gesetz vom 15. Juli 1912, betreffend die Anerkennung der Anhänger des Islams als Religionsgesellschaft*, RGBl. Nr. 159/1912, as amended by BGBl. Nr. 164/1988 (VfGH), provides that the "teachings of Islam, its institutions and usages" are statutorily protected "in so far as they are not inconsistent with the statutes of the state (*insoweit sie nicht mit den Staatsgesetzen in Widerspruch stehen*)".

In an article originally published in 1980 Dieter Grimm (2011a, p. 19), professor of public law at Humboldt-Universität zu Berlin and a former Judge of the *Bundesverfassungsgericht*, differentiated a material law-governed state from a formal law governed state:

> "The formal law-governed state (*formale Rechtsstaat*), which bound the executive to the statute, without subjecting even this to other than formal constraints, had been powerless with respect to non-law in statutory form (*Unrecht in Gesetzesform*). The material law-governed state (*materielle Rechtsstaat*) therefore also forgathered safeguarding precautions against the legislature. Its materiality consists in the integration of a quality standard (*Qualitätsmaßstab*) into the statute concept (*Gesetzesbegriff*). Only that legislative act which conforms to certain content requirements can still claim validity. These requirements essentially ensue from fundamental rights, which themselves expand therewith their function".

"Is the European Court of Justice a legal or political institution now?", Michelle Everson, professor of European law at Birkbeck, University of London, asked in an article published in 2010. The Court of Justice has and pursues its own "political programme", she said: "the integration of Europe through law..." (Everson, 2010, p. 1). Giving evidence to a UK parliamentary committee later that year, Konrad Schiemann, one of the Judges of the Court of Justice, "noted that the Treaty [on European Union] calls for an 'ever closer Union'[438], and that the Court took seriously its obligation to follow the Treaty". He said the Court of Justice "did not see itself as having a mission independent of what the Treaties prescribed" (House of Lords Committee on the European Union, 2011, p. 51). In answer to the criticism that the Court of Justice "is driven by a pro-European judicial activism", Vassilios Skouris, the President of the Court of Justice, said at a conference in Berlin on 2 November 2005 that the Court "has to give effect to a Treaty[439] that is based on the idea of integration and that has integration as its purpose". He asked how the Court could not "place this integrative approach at the heart of the legal reasoning?" "Second", he said, "interpreting a piece of legislation that lacks clarity or whose interpretation deliberately leaves some freedom of manoeuvre will *inescapably* lead the Court to fill in the gap"[440] (emphasis added). "It is a well-known circumstance (*ein bekannter*

[438] Article 1 of the Treaty on European Union (OJ C 83, 30.3.2010, p. 16).

[439] Then the Treaty establishing the European Community (OJ C 325, 24.12.2002, p. 33).

[440] "In a thick book some passages are always to be found which one can misconstrue", Ehrlich (1914, p. 462) once remarked.

Sachverhalt)" that the "inactivity of the legislature compels the courts to decide questions and solve problems that really would be for the legislature to regulate", Hans Kutscher (1976, p. I-36), then a Judge of the Court of Justice of the European Communities, said on 27 September 1976. Kutscher (1976b, p. I-37) argued that "one of the reasons that it is so often necessary to the Court to have recourse (*zurückzugreifen*) in the interpretation of Community law to the objectives of the Community and to general legal principles" is that the inactivity of the legislature" of the Community had resulted in a "norms deficit (*Normendefizit*)".

The free law movement "disputes the *derivability* of all judgements from the statutes (*die* Ableitbarkeit *aller Urteile aus dem Gesetze*), but…insists on their *compatibility* (Vereinbarkeit) with these", Kantorowicz wrote in 1908 (1908a, p. 77). The "adherents of the movement...want in the main nothing more than to *state* (konstatieren): that the judge everywhere concludes not only from the statute, but also is and must be *praeter legem* law-creatively active (praeter legem *rechtsschöpferisch tätig*)", he wrote in a review published the previous year (Kantorowicz (1907, p. 1451).. The free law doctrine explains that judgements that are not derivable from formal law are derivable from free law.

Every court is "*praeter legem* law-creatively active (praeter legem *rechtsschöpferisch tätig*)". Every court has in that sense what Baudenbacher (2004, p. 385) described as "a free law attitude". "The free law movement combined with the recognition of statutory gaps (*Gesetzeslücken*) the cognizance of the creative task of the judge within these statutory gaps", Gustav Radbruch (1990, p. 195) said in *Vorschule der Rechtsphilosophie* (1948). The representatives of the free law movement, Radbruch said, "did not assert, as their opponents have repeatedly reproached, the authority of the judge to disregard the statute; rather, they demanded the agreement of the judicial ruling with the statute and denied only the derivability of every judicial ruling from the statute". Radbruch (1990, p. 195) acknowledged, however, that "the different trends of the free law movement...came to different formulations on the method of creative gap-filling (*schöpferischen Lückenausfüllung*)".

How the law will be applied should be predictable but volitional decisions, because they are unpredictable, are inconsistent with the principle of legal certainty. The discretion of the judge is "necessary", according to Hess (2003, p. 48), because legal propositions are "often unable to predict every individual case and to define in advance the precise circumstances in which judicial orders will be made". As Ehrlich (1913, p. 140) said, "the more generally the legal proposition is expressed, the more freedom obviously left to the judge". Judges have far more "freedom" than is necessary because legal propositions are expressed "more generally" than is consistent with the principle of legal certainty.

"The prohibition of the misuse of rights (*Das Verbot des Rechtsmißbrauchs*) proves that not even rights *in rem*[441] (*dingliche Rechte*) may be exercised without regard to extra-legal norms (*außerrechtliche Normen*)…", Ehrlich (1913, p. 45) observed. A modification of the free law doctrine is proposed incorporating societal legal norms in the definition of law but invalidating societal legal norms and other norms inconsistent with fundamental rights of the individual and the legislative acts of the state. The direct third-party effect of fundamental rights (*die unmittelbare Drittwirkung der Grundrechte*) is also recommended. The factual should be a source of norms when this is practicable but the normative force of the factual (*die normative Kraft des Faktischen*) (Jellinek) has been largely unexamined. "Legal research has moved within very limited borders, relative to its proper field, because it has not been grounded in ideas adequate to the intellectual challenge which the phenomena of legal order present", the legal historian James Willard Hurst (6.10.1910 – 18.6.1997) commented in 1960 (Hurst, 1960, p. 521). That there are ideas adequate to that challenge has been demonstrated in this thesis.

The Union is „*eine Rechtsunion*", the Grand Chamber of the Court of Justice of the European Union reiterated in paragraph 91 of the German language version of its judgement of 3 October 2013 in Inuit Tapiriit Kanatami and others v. European Parliament and Council of the European Union [2013] ECR I-0000. In the Dutch language version this is translated as "a union that is governed by law (*een unie die wordt beheerst door het recht*)".

"The term *Rechtsstaat* can mean as many different things as the word 'law' itself...", Carl Schmit (11.7.1888 – 7.4.1985) wrote in his 1932 essay *Legalität und Legitimität*[442] (Schmitt, 2004, p. 14). *Rechtsstaat* is an "ambiguous term", Schmitt (1928, p. 172) had reflected in 1928 in his book *Verfassungslehre*[443]. "It is conceivable", he said in 1932, "that propagandists and advocates of all types could claim the word for their own purposes, in order to denounce the opponent as the enemy of the *Rechtsstaat*" (Schmitt, 2004, p. 14). This was an accurate prediction. What does it mean to be governed by law? What does the term law itself mean?

[441] A right *in rem* is a right "against or with reference to an object or property…": http://www.oed.com/view/Entry/92971

[442] Legality and legitimacy.

[443] Constitutional theory.

"The definition of law" is the title of an essay written by Hermann Kantorowicz in 1939 but not published until 1958. "Any question", he wrote, "as to the meaning of a term can be answered only if the intention is to ask what…*ought* to be understood by this particular term…" (Kantorowicz, 1958, p. 5) (emphasis in original). Kantorowicz (1958, p. 79) defined "law" in this essay as "*a body of social rules prescribing external conduct and considered justiciable*". For Ehrlich (1913, p. 159) "the entire law (*das gesamte Recht*)" in a society is in the norms contained in "the legal order that the society independently creates" and in the norms contained in the "legal order that is formed by legal propositions is formed by legal propositions and which is implemented only by the activities of the courts and state authorities". He argued that "only the norms that these two orders contain actually make up the entire law in the society (*das gesamte Recht in der Gesellschaft*)" (Ehrlich, 1913, p. 159). "The rules that people themselves observe as binding for them in their coexistence are the living law (*das lebende Recht*)", he wrote (Ehrlich, 1920, p. 9). The living law "asserts itself in the voluntary actions of the parties" (Ehrlich, 1920, p. 9).

If the Union were a *Rechtsunion* it would be governed by "the entire law (*das gesamte Recht*)" in that society (Ehrlich, 1913, p. 159). It would be a material *Rechtsunion* if, to quote Grimm (2011a, p. 19), "a quality standard (*Qualitätsmaßstab*)" is integrated into the concept of law: a legal norm is valid only if it conforms to certain content requirements essentially ensuing from fundamental rights.

The European Union is not but could be made into a material *Rechtsunion*.

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